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IN THE

Supreme Court of the United States

WILLIAM I. KOCH; OXBOW ENERGY, INC.; SPRING CREEK ART FOUNDATION, INC.; NORTHERN TRUST COMPANY; FREDERICK R. KOCH; and THE FIDUCIARY TRUST COMPANY INTERNATIONAL,

Petitioners,

v.

KOCH INDUSTRIES, INC.; CHARLES G. KOCH; STERLING V. VARNER; DAVID H. KOCH; DONALD L. CORDES; and THOMAS M. CAREY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In determining whether an error in a civil case is harmless for the purposes of 28 U.S.C. § 2111, should a court use the same standard established for criminal cases in *Kotteakos* v. *United States*, 328 U.S. 750 (1946), as eight courts of appeals have held, or should it establish a divergent and less rigorous standard for civil cases, as the Tenth Circuit and three other courts of appeals have held?

PARTIES TO THE PROCEEDINGS BELOW

Plaintiffs-appellants below, and petitioners in this Court, are:

> William I. Koch, Oxbow Energy, Inc., Northern Trust Company, as trustee, Spring Creek Art Foundation, Inc., Frederick R. Koch, and The Fiduciary Trust Company International, as trustee.

Plaintiffs-appellants below, and petitioners in a separately filed petition to this Court, are:

> L.B. Simmons Energy, Inc. d/b/a Rocket Oil Company, Gay A. Roane, Ann Alspaugh, Paul Anthony Andres Cox, Holly Antoinette Andres Cox Farabee, and Ronald W. Borders.

Also appearing as plaintiffs below were:

> United States Trust Company of New York, as trustee, Marjorie Simmons Gray, as trustee, Marjorie L. Simmons, as trustee, and Nationsbank, N.A., as co-trustee of the Louis Howard Andres Cox Trusts B & D.

Defendants-appellees below, and respondents in this Court, are:

> Koch Industries, Inc., Charles G. Koch, David H. Koch, Sterling V. Varner, Donald L. Cordes, and Thomas M. Carey.

CORPORATE DISCLOSURE STATEMENT

Neither Oxbow Energy, Inc., nor Spring Creek Art Foundation, Inc., have any publicly traded parents or subsidiaries. The Northern Trust Company and the Fiduciary Trust Company International are appearing solely as trustees for William I. Koch and Frederick R. Koch.

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PETITION FOR WRIT OF CERTIORARI

Petitioners William I. Koch, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

This case presents the Court with a rare opportunity to resolve a deep and intractable inter-circuit conflict concerning the proper standard of harmless error review in civil cases.

Adopting the standard established by this Court in *Kotteakos v. United States*, 328 U.S. 750 (1946) (a criminal case), a majority of circuits have held that a trial error in a civil case can be deemed "harmless" only if the court is "fairly assured" or if there is a "high probability" that the er-

ror did not influence the jury's verdict. However, a minority of circuits – beginning with the Ninth Circuit, and followed by the Seventh, Eighth, and Tenth Circuits – have expressly rejected the use in civil cases of the *Kotteakos* harmless-error standard. These circuits instead have embraced a less exacting standard by holding that a trial error in a civil case should be deemed harmless whenever it can be said that the verdict "more likely than not" would have been the same if the error had not occurred.

The panel below applied the minority view to affirm a judgment in a billion-dollar securities fraud case that was tainted by egregious evidentiary errors. Under the correct harmless-error standard followed by the majority of circuits, the judgment should be reversed.

OPINIONS BELOW

The opinions of the district court denying petitioners' motion *in limine* and a related motion for reconsideration are published as *Koch* v. *Koch Industries, Inc.*, 2 F. Supp.2d 1385 (D. Kan. 1998) and *Koch* v. *Koch Industries, Inc.*, 6 F. Supp.2d 1207 (D. Kan. 1998) and are reproduced as Appendices B & C (pages B1-B51 and C1-C13, *esp.* B9-B14, B49-B50, and C4-C10), attached hereto. The opinion of the district court denying petitioners' motion for mistrial is not published in the official reports but is available as *Koch* v. *Koch Industries, Inc.*, 1998 WL 975598 (D. Kan,. 1998) and is reproduced as Appendix D (pages D1-D12), attached hereto. The Tenth Circuit's decision affirming the district court is published as *Koch* v. *Koch Industries, Inc.*, 203 F.3d 1202 (CA11 2000), and is reproduced as Appendix A (pages A1-A70, *esp.* A37-A41), attached hereto. The Tenth Circuit's order denying rehearing and rehearing *en banc* is unpublished and is reproduced as Appendix E (pages E1-E2), attached hereto.

JURISDICTION

The Tenth Circuit issued its decision in this case on February 14, 2000 and its order denying rehearing and rehearing *en banc* on April 4, 2000. On June 23, 2000, Justice Breyer extended the time for filing a petition for certiorari to and including August 2, 2000. This Court has jurisdiction to hear this petition pursuant to 28 U.S.C. § 1254(1)

STATUTORY PROVISION INVOLVED

This case presents a question involving the proper standard to be used when engaging in harmless-error review pursuant to 28 U.S.C. § 2111, "Harmless Error," which provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

STATEMENT OF THE CASE[1]

This is a securities-fraud case arising out of one of the most notable private securities transactions in American history. As much as $2 billion is at stake.

Respondent Koch Industries, Inc. is a privately-held integrated oil company based in Wichita, Kansas. With annual revenues of as much as $35 billion, Koch Industries currently ranks as the second largest privately-held corporation in the United States. Respondents Charles Koch and David Koch are two of the four sons of the company's founder. Charles and David currently control Koch Industries, and own substantially all of its outstanding stock. The other respondents are former corporate officers and directors.

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[1] Unless otherwise noted, the facts are taken from the Tenth Circuit and district court opinions, attached as Appendices A through D.

Petitioners William Koch and Frederick Koch are the other two of the four sons of the company's founder. Until 1983, petitioners collectively owned 48% of the company's stock.[2] The other 52% of the company's stock was controlled by respondents Charles Koch and David Koch.

In 1983, respondents bought out petitioners' 48% interest in Koch Industries for $1.1 billion. After the buyout, petitioners discovered information indicating that respondents had made false representations concerning the value of the company's assets and its financial condition.

Petitioners brought suit in the United States District Court for the District of Kansas under sections 10(b) and 20(a) of the Securities Exchange Act of 1934, SEC Rule 10b-5, and for fraud, breach of warranty, and breach of fiduciary duty. Jurisdiction in the district court was based upon 28 U.S.C. §§ 1331, 1332, and 1367.

In 1998, the case was tried to a jury. At trial, respondents defended themselves, in part, by falsely portraying petitioner William Koch, the lead plaintiff and the plaintiffs' most important witness, as a greedy, litigious villain. In support of this "defense," respondents introduced misleading and highly prejudicial evidence of other, unrelated litigation between the parties, including evidence that William and Frederick Koch even "sued their own mother."

Respondents' conduct at trial was expressly permitted, over petitioners' objections, by the district court. Prior to trial, petitioners filed a motion *in limine* to exclude the evidence of unrelated litigation. The district court denied the motion. It concluded that such evidence, including evidence of the lawsuit involving William Koch's mother, was "central" to respondents' case. App. B12. The district court fur-

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[2] This figure includes stock formerly owned by members of the Simmons family, who have filed a separate petition for certiorari.

ther noted that the exclusion of this evidence would "eviscerate" respondents' defense. App. B12.[3]

At trial, petitioners objected to the prejudicial demonization of William and Frederick Koch at every opportunity. Petitioners objected during the relevant portion of respondents' opening statements to the jury, and again when the evidence was admitted during the cross-examination of petitioner William Koch. After the evidence was admitted, petitioners moved for a mistrial. The district court overruled the objections, and denied the motion for mistrial.

At the conclusion of the trial, the jury found that the defendants did in fact make misrepresentations and/or omissions in connection with the buyout. However, the jury awarded no damages. App. A7.

Petitioners appealed to the Tenth Circuit, pursuant to 28 U.S.C. § 1291. The Tenth Circuit affirmed. Although the court expressly found that the inflammatory evidence was "not relevant" and that "the district court erred in admitting it," App. A41, it held that the error was harmless.

Restating the law of the circuit concerning harmless-error-review, the panel stated that "[the Tenth Circuit] deems such wrongly admitted evidence prejudicial only if we reasonably conclude that the jury would have reached a different result without that evidence." App. A41. The panel then remarked that it was not convinced "that the jury would have found for the [petitioners] had it not learned of these other lawsuits." *Id.*

Petitioners sought rehearing and rehearing *en banc* on this issue. The petition expressly argued that the panel decision

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[3] In response to a motion for reconsideration, the district court made matters even worse. The court ruled that the respondents could admit superficial information about the unrelated lawsuits (*i.e.*, that William Koch sued his brothers on several other occasions and that William and Frederick Koch even "sued their own mother"), but that petitioners could not respond by explaining the underlying merits or details of those lawsuits.

exacerbated an existing inter-circuit conflict on the civil harmless-error standard. The Tenth Circuit denied rehearing and rehearing *en banc* without comment.

This petition for certiorari followed.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the Tenth Circuit's decision applying the "probable-harm" standard for whether an error in a civil case requires reversal conflicts with the "significant-possibility-of-harm" standard applied by eight other circuit courts of appeals. The question presented raises an important national issue potentially affecting every single civil case filed or reviewed in the federal courts.

Although this Court has addressed the appropriate standard of harmless-error review in the criminal and habeas contexts, it has never defined the harmless-error standard in a civil case. The result is a festering inter-circuit split on a fundamental issue of federal court procedure – the degree of certainty a court must have in order to disregard an error as "harmless." This case presents an opportune vehicle with which to resolve this important issue affecting the quality of civil justice throughout the country.

I. THERE IS AN INTRACTABLE 8-4 SPLIT OVER THE STANDARD FOR HARMLESS ERROR IN CIVIL CASES.

In *Kotteakos* v. *United States*, this Court set forth the standard to be followed by appellate courts in determining whether a trial error should be deemed harmless The Court explained:

> If, when all is said and done, the [court's] conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand .... But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment

> was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

328 U.S. at 764-65; *see id.* at 776 (error not harmless if it had "substantial and injurious effect or influence" upon the jury).

Kotteakos was a criminal case. However, because the harmless-error statute, currently codified at 28 U.S.C. § 2111, applies equally to civil and criminal cases, eight courts of appeals – the First, Second, Third, Fourth, Fifth, Sixth, Eleventh, and D.C. Circuits – have held that the standard set forth in *Kotteakos* should also be employed in civil cases. *See Lataille v. Ponte*, 754 F.2d 33, 37 (CA1 1985) (applying Kotteakos standard of whether court can say "with fair assurance … that the judgment was not substantially swayed by the error"); *Cohen v. Franchard Corp.*, 478 F.2d 115, 125 (CA2) (same), *cert. denied,* 414 U.S. 857 (1973); *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 923-28 (CA3 1985) (*Kotteakos* standard applies in both criminal and civil cases, *i.e.*, errors "are not harmless unless it is 'highly probable' that they did not affect a party's substantial rights"); *Glass v. Philadelphia Elec. Co.*, 34 F.3d 188, 191 (CA3 1994) ("error is harmless only 'if it is highly probable that the error did not affect the outcome of the case.'"); *Taylor v. Virginia Union Univ.*, 193 F.3d 219, 235 (CA4 1999) (adopting *Kotteakos* test of "'whether the error itself had substantial influence'"), *cert. denied,* -- U.S. --, 120 S. Ct. 1243 (2000); *Howard v. Gonzales*, 658 F.2d 352, 357 (CA5 Unit A 1981) (applying *Kotteakos* standard that if, "in the reviewing court's conviction the error did not influence the jury or had but very slight effect, the error is harmless"); *Schrand v. Federal Pacific Elec. Co.*, 851 F.2d 152, 157 (CA6 1988) (adopting *Kotteakos* standard as applied by the D.C. Circuit); *Aetna Cas. & Surety*

Co. v. Gosdin, 803 F.2d 1153, 1159 (CA11 1986) ("in civil cases courts should apply the same standard as announced in *Kotteakos*"); *Williams v. United States Elevator Corp.*, 920 F.2d 1019, 1022-23 (CADC 1990) (applying *Kotteakos* substantial influence test); *Jordan v. Medley*, 711 F.2d 211, 219 n. 6 (CADC 1983) (Scalia, J.) (*Kotteakos* standard "is used by this court and others to determine effect upon 'substantial rights' in civil cases").

The Seventh, Eighth, Ninth, and Tenth Circuits, however, do not apply *Kotteakos* in civil cases, but instead apply a less rigorous civil harmless-error standard that requires reversal only if the error "more probably than not" altered the result in the case. *Haddad v. Lockheed Cal. Corp.*, 720 F.2d 1454, 1458-59 (CA9 1983) (rejecting a "possibly influenced" standard applied in criminal cases and holding that "an error in a civil trial need only be more probably than not harmless"); *see also Smith* v. *Chesapeake & Ohio Ry. Co.*, 778 F.2d 384, 389 (CA7 1985) (applying more-probable-than-not standard); *McIlroy v. Dittmer*, 732 F.2d 98, 105 (CA8 1984) ("jury would more probably than not still have reached the same result," citing Ninth Circuit standard); *United States Indus.* v. *Touche Ross & Co.*, 854 F.2d 1223, 1252-53 n. 39 (CA10 1988) (rejecting the *Kotteakos* standard and instead asking "whether the substantial rights of the parties were more probably than not unaffected by the error"), *impliedly overruled on other grounds as recognized in Suiter* v. *Mitchell Motor Coach Sales, Inc.*, 151 F.3d 1275, 1288 (CA10 1998).

The Tenth Circuit in this case applied its established harmless-error standard, asking whether the "jury would have reached a different result." App. A41. As the Tenth Circuit has previously recognized, *United States Indus.*, 854 F.2d at 1252-53 n. 39, that standard conflicts with the *Kotteakos* sub-

stantial-influence standard applied in the majority of the circuits on the opposite side of the issue.[4]

This well-developed split has no realistic prospect of resolving itself. Courts on both sides of the issue have acknowledged the existence of the split and have expressly disagreed with their sister circuits on the opposite side.

On the majority side of the split, the D.C. Circuit has observed that it is "well aware that the circuits are divided on the appropriate standard of review to apply in gauging the effect of an error in a civil case." *Williams*, 920 F.2d at 1023. Likewise, in the most recent addition to the majority view, the *en banc* Fourth Circuit in *Taylor v. Virginia Union University* collected cases, expressly joined the majority of circuits in applying the *Kotteakos* standard to civil cases, and recognized that a minority of circuits "have refused to apply the *Kotteakos* standard in the civil context." 193 F.3d at 235 & n. 10. On the minority side of the split, the Tenth Circuit likewise has held firm despite having "recognize[d] that the circuits are divided on the appropriate standard of review to apply in

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[4] Beyond the primary split on the substance of the harmless-error standard, there is a related split over who bears the risk of uncertainty or doubt as to whether an error is harmless. Justice Thomas, dissenting in *O'Neal*, has recognized the existence of this further split as to the "burden of showing prejudice" in a civil appeal. *O'Neal*, 513 U.S. at 450 (Thomas, J., dissenting); *compare Morrison Knudsen Corp. v. Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1241 (CA10 1999) (allocating "risk of doubt" as to harmlessness to appellant); *Hygh* v. *Jacobs,* 961 F.2d 359, 365 (CA2 1992) ("burden of demonstrating prejudice requiring reversal rests with the party asserting error"); *Smith* v. *Wal-Mart Stores (No. 471)*, 891 F.2d 1177, 1180 (CA5 1990) (*per curiam*) ("party asserting error has the burden of proving that the error prejudiced a substantial right"); *United States* v. *Killough*, 848 F.2d 1523, 1527 (CA11 1988) (same); *and Flanigan* v. *Burlington Northern Inc.*, 632 F.2d 880, 889 (CA8 1980) ("it is the appellant's burden to establish the prejudicial effect"), *cert. denied*, 450 U.S. 921 (1981), *with Ahern* v. *Scholz*, 85 F.3d 774, 786 (CA1 1996) (grave doubt as to effect treated as harmful); *Barth* v. *Gelb*, 2 F.3d 1180, 1188 (CADC 1993) (same), *cert. denied*, 511 U.S. 1030 (1994).

gauging the effect of an error in a civil case." *United States Indus.*, 854 F.2d at 1252-53 n. 39.

Thus, notwithstanding the recognized opposing views of the other circuits, courts on both sides have continued to hold to those opposing views as to whether the *Kotteakos* standard applies in both civil and criminal cases. Indeed, the Tenth Circuit, from which this case arises, had long ago aligned itself with the minority view of the Seventh, Eighth, and Ninth Circuits and there is no reason to believe that it will revisit that choice, as corroborated by its denial of rehearing *en banc* in this case. App. E1. *See also Aetna*, 803 F.2d at 1160 n. 13 (CA11) (recognizing split); *McQueeny*, 779 F.2d at 925-27 (CA3) (extensively analyzing and expressly rejecting less stringent standard from Eighth and Ninth Circuits); *cf. Haddad,* 720 F.2d at 1458-59 & nn. 6-7 (CA9) (noting distinguished commentary on alternative harmless-error standards and nonetheless rejecting unified standard for civil and criminal cases). There is no indication that these courts of appeals will alter their long-held views without controlling direction from this Court.

The need for this Court to resolve this split expressly and decisively is demonstrated by the persistence of the split even after this Court's decision in *O'Neal* v. *McAninch*, 513 U.S. 432 (1995). *O'Neal* contains strong language in support of the majority position. This Court wrote in *O'Neal* that "civil and criminal harmless-error standards do not differ in their treatment of grave doubt as to the harmlessness of errors affecting substantial rights." 513 U.S. at 441. The significance of the *O'Neal* case for the merits of this petition will be discussed in the following section; what is important regarding the circuit split, however, is that the Tenth Circuit and other courts in the minority continue to apply a less stringent standard despite the highly significant language from *O'Neal*. *See Kennedy* v. *Southern California Edison Co.*, -- F.3d --, --, 2000 WL 991836, at *9 (CA9 2000) (harmless-error review in a civil case asks whether the "'error is more probably than

not harmless,'" and "is 'less stringent' than review for harmless error in a criminal case") (citations omitted); *cf. ATD Corp.* v. *Lydall, Inc.*, 159 F.3d 534, 549 (CA Fed.1998) (post-*O'Neal* case noting the split and the use of the different "more probable than not" standard by the Seventh, Eighth, Ninth, and Tenth Circuits). There is thus no realistic prospect of the split resolving itself without this Court's intervention.

II. THE TENTH CIRCUIT'S PROBABLE-CHANGE-IN-OUTCOME TEST CONFLICTS WITH THIS COURT'S CASES INTERPRETING THE HARMLESS-ERROR STATUTE, 28 U.S.C. § 2111.

In becoming the most recent circuit to join the majority view regarding harmless error, the *en banc* Fourth Circuit succinctly summarized the merits of applying the *Kotteakos* standard in civil cases:

> [W]e can fathom no sound justification for using a different test for determining whether a lower court's error affected an appellant's substantial rights in the civil context as compared to the criminal context. Indeed, by its own terms, § 2111 makes no distinction between civil and criminal cases, thereby implying that Congress intended uniform treatment of the statute's language in the civil and criminal contexts.

Taylor, 193 F.3d at 235. Not only does this view make sense as a construction of § 2111, it finds substantial support in this Court's cases interpreting the harmless-error statute.

Over 50 years ago in *Kotteakos* itself, this Court observed regarding § 2111's predecessor that the "statute in terms makes no distinction between civil and criminal causes." *Kotteakos*, 328 U.S. at 762. And in discussing the statute, the Court cited to Federal Rule of *Civil* Procedure 61, as well as to various criminal rules. *Id.* at 757 n. 9. Twenty years later in *Chapman* v. *California*, 386 U.S. 18, 22 n. 5 (1967), the Court again cited to Federal Rule of Civil Procedure 61, even though discussing § 2111 in the context of a criminal case.

More recently in a civil case, this Court addressed generally the application of the harmless-error statute in a civil case, but did not clearly state a particular formulation of that standard. *McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548 (1984). What the *McDonough* Court did do, however, was repeatedly cite to *Kotteakos* without any indication that that criminal decision was inapplicable in the civil context. *Id.* at 553-54. It also characterized harmless error as mere "abstract imperfection," while holding that the inability to challenge a juror for cause would warrant a new trial without any suggestion that the litigant need further show a probable different result had the juror been challenged. *Id.* at 556.

Most recently in *O'Neal*, a habeas case addressing who bears the risk of uncertainty whether an error is harmless, this Court observed that "precedent suggests that civil and criminal harmless-error standards do not differ in their treatment of grave doubt as to the harmlessness of errors affecting substantial rights." 513 U.S. at 441. Discussing *Kotteakos* and its construction of the predecessor to § 2111, the Court further noted, as *Kotteakos* had a half-century before, that the "statute, by its terms, applied to both civil and criminal cases." *Id.*

The *O'Neal* Court observed that "the current harmless-error sections of the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure (which use nearly identical language) both refer to" the predecessor to § 2111 as their statutory source. The Court further explained that:

> [E]ven if, for argument's sake, we were to assume that the civil standard for judging harmlessness applies to habeas proceedings (despite the fact that they review errors in state criminal trials), it would make no difference with respect to the matter before us. For relevant authority rather clearly indicates that, either way, the courts should treat similarly the matter of "grave doubt" regarding the harmlessness of errors affecting substantial rights, and as *Kotteakos* provides.

O'Neal, 513 U.S. at 441-42.

This Court's various considerations of the harmless-error statute, although yet to provide a definitive statement of the correct standard in the civil context, strongly support the majority view that the *Kotteakos* standard applies in both civil and criminal cases. The standard applied by the Tenth Circuit in this case, and by the other circuits in the minority, thus constitutes an erroneous interpretation of § 2111 warranting a grant of certiorari to enable this Court to establish a uniform and correct interpretation of that statute.

III. THE HARMLESS-ERROR STANDARD IN CIVIL CASES PRESENTS AN IMPORTANT NATIONAL QUESTION REQUIRING RESOLUTION BY THIS COURT.

The proper standard for harmless-error review in civil cases raises an important national issue requiring resolution by this Court. The standard potentially comes into play in virtually all of the civil cases filed each year. Indeed, a Westlaw search demonstrates that "harmless error" was discussed in approximately 427 opinions in civil cases in 1999, and has already been discussed in approximately 244 opinions in 2000.[5]

The question also arises in all manner of civil cases, from diversity actions involving contracts and torts, to federal question cases involving securities law and civil rights. *See, e.g., Williams*, 920 F.2d at 1020 (diversity case alleging neg-

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[5] The harmless-error standard under § 2111 also, as a practical matter, determines the harmless-error standard applied in district courts under Federal Rule of Civil Procedure 61. *See McDonough Power Equip.* v. *Greenwood*, 464 U.S. 548, 554 (1984) (harmless-error statute applicable to appellate courts, "incorporates the same principle as that found in Rule 61"); *McQueeny*, 779 F.2d at 923 n. 10 ("Although in this discussion we will often speak of the appellate court's standard of review, our discussion is also relevant to the trial court's harmless error analysis on consideration of post-trial motions."). As a result, the split over the appellate standard for harmless error also affects numerous cases and rulings that may never even reach the courts of appeal.

ligent infliction of emotional distress); *United States Indus.*, 854 F.2d at 1226 (federal securities case with various pendant state claims); *Lataille*, 754 F.2d at 34 (§ 1983 civil rights action). Given the great volume and topical breadth of cases affected by the harmless-error standard, it is all the more important that the law defining that standard be uniform throughout the country.[6]

At bottom, the standard of harmless-error review applied by the courts of appeals has a profound effect on the very quality of civil justice in the federal courts. If the majority of circuits are correct in holding that an error can be deemed harmless only if there is a high probability that the error did not affect the judgment, then the thousands of plaintiffs and defendants who are forced to litigate in the Seventh, Eighth, Ninth, and Tenth Circuits are being denied a sufficiently accurate and reliable determination of their rights and liabilities. This case thus presents an important question for the administration of civil justice in the federal courts that can only be resolved by this Court. *Cf. Kotteakos*, 328 U.S. at 752 ("We granted certiorari because of the importance of the question for the administration of criminal justice in the federal courts.").

IV. THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR RESOLVING THE INTER-CIRCUIT CONFLICT.

The tremendous financial stakes in this litigation give the parties an obvious incentive to brief the competing views on this issue vigorously and thoroughly. Both sides are also well-represented by experienced counsel familiar with federal court procedure and with Supreme Court practice. Perhaps

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[6] Consistency and uniformity in this area also have "certain administrative virtues" that "[i]n a highly technical area such as this one" will bring "simplicity, a body of existing case law available for consultation, ... and a consequently diminished risk of further, error-produced, proceedings." *O'Neal*, 513 U.S. at 443.

most importantly, the split is squarely and meaningfully presented by this case.

The evidence that was improperly admitted by the district court included the following: (1) that William and Frederick Koch had sued Charles and David on several other occasions; (2) that William and Frederick had even "sued their own mother" over a family foundation; (3) that William Koch had "greatly upset his mother by subpoenaing her into court"; (4) that the foundation lawsuit left their late mother so "broken hearted" that she disinherited them; (5) that William and Frederick then challenged their late mother's will; (6) and that the court found against William and Frederick "on every issue" in the will contest case. App. A38; Trial Transcript Vol. T1, at 354-55; Trial Transcript Vol. T4, at 2723-24.

The potential impact of this improperly admitted evidence cannot be understated. A juror need only hear once that the plaintiffs "sued their own mother" to be hopelessly prejudiced against them. Indeed, in denying petitioners' pretrial motion *in limine* to exclude this evidence, the district court itself concluded that it was "central" to respondents' case and that their defense would be "eviscerate[d]" without it. App. B12.

If the standard set forth by this Court in *Kotteakos* were to be applied in this case, reversal would be necessary. It cannot be said "with fair assurance" that the erroneous introduction of this inflammatory evidence did not have "a substantial and injurious effect or influence" in determining the jury's verdict. Only by invoking Tenth Circuit authority rejecting *Kotteakos* and applying a far less exacting standard of review did the panel below justify affirming despite the district court's error.

The panel below offered no alternative rationale for affirming the district court. If this Court concludes that the majority of circuits are correct in applying the *Kotteakos* standard in civil cases, the Tenth Circuit's judgment in this case must be reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 2, 2000.

APPENDIX A

203 F.3d 1202

William I. KOCH; Oxbow Energy, Inc.; L.B. Simmons Energy, Inc., doing business as Rocket Oil Company; Spring Creek Art Foundation Inc.; Gay A. Roane; Ann Alspaugh; The Northern Trust Company, as trustee; Paul Anthony Andres Cox; Holly A.A.C. Farabee; Ronald W. Borders' Frederick R. Koch; The Fiduciary Trust Company International, Plaintiffs-Appellants,

and

United States Trust Company of New York, as trustee; Marjorie Simmons Gray, as trustee; Marjorie L. Simmons, as trustee; Nationsbank N.A., co-trustee of the Louis Howard Andres Cox Trusts B & D, Plaintiffs,

v.

KOCH INDUSTRIES, INC.; Charles G. Koch; Sterling V. Varner; David H. Koch; Donald L. Cordes; Thomas M. Carey, Defendants-Appellees.

No. 98-3223.

United States Court of Appeals,
Tenth Circuit.

Feb. 14, 2000.

Arthur R. Miller, Cambridge, Massachusetts, (Fred H. Bartlit, Jr., Donald E. Scott, Ellen A. Cirangle, Ryan D. Downs, Glen E. Summers, of Bartlit, Beck, Herman, Palenchar & Scott, Denver, Colorado, Attorneys for Plain-

tiffs-Appellants William I. Koch, Oxbow Energy, Inc., Northern Trust Company and Spring Creek Art Foundation; Harry L. Najim, of Najim Law Offices, Wichita, Kansas; Russell E. Brooks, Eugene F. Farabaugh, of Milbank, Tweed, Hadley & McCloy, New York, New York, Attorneys for Plaintiffs-Appellants Frederick R. Koch and The Fiduciary Trust Company International; Gregory S.C. Huffman, L. James Berglund, II, Christopher L. Barnes, of Thompson & Knight, P.C., Dallas, Texas, Attorneys for Plaintiffs-Appellants L.B. Simmons Energy, Inc. d/b/a Rocket Oil Company, Gay A. Roane, Ann Alspaugh, Paul Cox, Holly Farabee and Ronald Borders, with him on the briefs).

Robert L. Howard, of Foulston & Siefkin L.L.P., Wichita, Kansas (James M. Armstrong, James D. Oliver, and Timothy B. Mustaine with him on the briefs) for Appellees.

Before EBEL, McWILLIAMS, and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

I. INTRODUCTION

In June of 1983, a group of Koch Industries, Inc. ("KII") stockholders entered into a Stock Purchase Agreement ("SPA") with KII. Under the SPA, the selling stockholders (the "Plaintiffs"), who owned 47.8% of KII stock, received $200 per share, a total value of approximately $1.1 billion. Two years later, the Plaintiffs sued KII and individual KII officers (the "Defendants"), claiming the Defendants misrepresented and omitted material facts during the negotiation of the SPA, which resulted in the Plaintiffs' undervaluation of KII stock. Thirteen years later, the case finally went to trial. Following an eleven week trial, a jury returned a verdict in favor of the Defendants. The Plaintiffs now appeal a host of district court rulings, made both prior to and during trial.

Specifically, the Plaintiffs challenge the district court's summary judgment ruling; its construction, application, and unwillingness to vary the terms of the pretrial order; various

evidentiary rulings; jury instructions on state law claims; the district court's restrictions on the Plaintiffs' fraud claims; its limitation of damages; and, generally the trial court's administration of this litigation. With the exception of the district court's jury instructions on two fraud claims premised on Texas state law, this court affirms the judgment of the district court.

II. BACKGROUND

A. Factual Background

The subject of this dispute, KII, is the second largest privately-held corporation in the United States. Based in Wichita, Kansas, KII owns an array of energy-related operations in the United States and Canada. Specifically, KII's assets include oil refineries, service stations, pipelines, coal mines, oil and gas exploration properties and processing plants, and a fleet of trucks. KII also owns numerous ranches and several hundred Chrysler dealerships.

Originally named the Rock Island Oil and Refining Company, KII was founded by Fred C. Koch, the father of plaintiffs William and Frederick Koch and defendants Charles and David Koch. Fred Koch launched the company after World War II, when his mentor, L.B. Simmons, sold a refinery and several pipelines to Fred. In exchange, L.B. Simmons received stock and cash and he soon purchased additional shares of Rock Island Oil and Refining.

L.B. Simmons' stock eventually passed individually and in trust to the following plaintiffs: Gay Roane, Holly Farabee, and Ronald Borders (the "Texas Plaintiffs"), Ann Alspaugh, Paul Cox, and L.B. Simmons Energy, Inc. (collectively, the "Simmons Family"[1]). For decades, the Simmons Family elected a director to KII's Board of Directors. Those

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[1] The Simmons Family includes the Texas Plaintiffs as well as Alspaugh, Cox, and L.B. Simmons Energy, Inc.

members of the Simmons Family involved in the instant suit are cousins to the four Koch brothers.

In 1966 and 1967, Fred Koch gave all his common shares of KII stock to trusts created for his four sons, granting equal shares to plaintiff William and defendants Charles and David, but a lesser amount to plaintiff Frederick. When Fred Koch died in 1967, Charles succeeded his father as a director and chief executive officer of KII, positions he retains today. David went to work for KII in 1970 and presently serves as an executive vice-president and a director. William joined KII full-time in 1974, becoming vice-president of corporate development five years later and continuously serving as a director from 1967 to 1983. Frederick, however, displayed substantially less interest in the company; he was never a KII employee and did not place a representative on the board until March of 1981.

In 1980, a dispute erupted over the management of KII, pitting William, Frederick and the Simmons Family against Charles and David. During this contentious power struggle, Charles and David purchased the 4 % of KII stock owned by Howard Marshall III, the son of director J. Howard Marshall II. As a result, the voting percentage of stock retained by William, Frederick and the Simmons Family stood at 47.8 %, while Charles, David and the family of J. Howard Marshall II controlled 49.7 %, with employees and others owning the balance. In addition, the Board voted to terminate William's employment at KII.

At that point, KII began negotiating with William, Frederick and the Simmons Family either to buy back some or all of their stock or to take KII public and have the now dissident shareholders sell their stock on the public market. Both sides then retained law firms and investment banking companies to represent them in the negotiations. On behalf of the dissident shareholders, the investment banking firm Goldman Sachs undertook an extensive valuation study of KII, beginning in the spring of 1982.

These efforts culminated in the June 1983 SPA. Signed by all parties on June 4, 1983, the SPA provided that William, Frederick and the Simmons Family would sell their shares of KII common stock back to the company for $200 per share. In addition, the selling shareholders received their pro rata interests in an offshore oil concession. The SPA contained two relevant warranties by KII: The first provided that all KII financial statements disclosed to the selling shareholders had fairly presented KII's financial condition and were prepared in accordance with generally accepted accounting principles. The second warranty promised that since December 31, 1982, the Defendants had provided all information "which if fully disclosed might materially affect the valuation of [KII] stock...."

B. Procedural Background

In June of 1985, two years after signing the SPA, the selling shareholders filed suit, claiming the Defendants had misrepresented or failed to disclose material facts which, if properly provided, would have increased the Plaintiffs' valuation of KII stock at the time of the SPA. Specifically, the complaint detailed three alleged misrepresentations concerning KII's oil and gas properties in the Persian Gulf, Utah, and North Dakota and further alleged a general scheme to conceal the true value of KII stock. The Plaintiffs asserted federal claims under sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b-5, and state claims for breach of fiduciary duty, breach of warranty, and fraud. They requested actual damages of over $2 billion. The Defendants named in the action were KII; Charles and David Koch; Sterling Varner, the president and a director of KII; Tom Carey, KII's vice-president of finance; and Donald Cordes, KII's vice-president of legal affairs.

On November 5, 1986, the district court granted summary judgment in favor of the Defendants on the Persian Gulf and Utah claims, but denied summary judgment on the North Da-

kota claim. The district court also determined the Plaintiffs' allegation of a general scheme to conceal the value of stock failed to meet the particularity requirement of Rule 9(b) of the Federal Rules of Civil Procedure. After several failed attempts to bring the excluded claims before other fora,[2] in 1989 the Plaintiffs persuaded the district court to grant them leave to amend their complaint, adding both general and spe-

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[2] The Plaintiffs first filed a motion for reconsideration of the grant of summary judgment and a motion for leave to amend their complaint to meet Rule 9(b)'s particularity requirement, but the district court denied these two motions. The Plaintiffs then unsuccessfully petitioned this court for a writ of mandamus compelling the district court to vacate the order denying them leave to amend. *See Koch* v. *Koch*, 1988 WL 130669, at *2 (D.Kan., Nov.4, 1988). Later that year, the Plaintiffs brought a separate suit before another judge of the United States District Court for the District of Kansas, again alleging fraud and misrepresentation regarding the SPA. *See Oxbow Energy, Inc.* v. *Koch Indus., Inc.*, 686 F. Supp. 278, 279-80 (D.Kan.1988). The district court, however, granted summary judgment to the Defendants, because it "required [the Plaintiffs] to bring all claims of misrepresentation arising out of the [SPA] in one action." *Id.* at 282. In that order, the district court stated,

> [T]he court cannot condone plaintiffs' practice of running to a different city within the district and filing a new case every time a judge in a prior action makes a ruling adverse to that litigant's position. The court cannot be made a party to what is in effect an appeal from Judge Crow's ruling in the 1985 action.

Id. Finally, in 1988, in a suit brought by Charles and David Koch against William Koch requesting specific performance of a sales contract concerning a coin collection and real property, William counterclaimed, alleging he was excused from performance due to Charles' and David's misrepresentations regarding the SPA. *See Koch*, 1988 WL 130669, at *1-* 2. Yet a third judge of the same district court dismissed William's counterclaim as precluded by the summary judgment order issued in *Oxbow Energy, Inc.* v. *Koch Indus., Inc.* *See Koch*, 1988 WL 130669, at *3-*4. After reciting the above-quoted language from the *Oxbow Energy* summary judgment order, the district court concluded, "This counterclaim is the third vehicle which defendant has used to raise the same issues.... This court is even more emphatically unwilling to overrule the clear decisions of two learned brothers." *Id.* at *4.

cific allegations of fraudulent accounting policies and practices. Based on this amended complaint, the Plaintiffs then sought broad discovery from several non- parties, requests which a magistrate judge and the district court strictly limited.

In 1993, the district court closed discovery. The Defendants then filed a motion for summary judgment on all of the remaining claims. On July 11, 1997, the district court issued its order, granting summary judgment to the Defendants on several of the Plaintiffs' claims. The district court, however, denied summary judgment on one of the Plaintiffs' accounting claims, which alleged the Defendants failed to disclose that certain expenses were "unusual or infrequently occurring." In addition, the district court preserved the Plaintiffs' claims that the Defendants withheld information about two expansions of KII's Pine Bend Refinery in Minnesota. Just prior to trial the district court further ruled that Texas law governed the Texas Plaintiffs' state law fraud claims.

In 1998, an eleven week jury trial proceeded on the accounting and Pine Bend claims. The jury eventually returned a verdict in favor of the Defendants. With respect to the Pine Bend claims, the jury found that the Defendants had withheld information but that their misrepresentations or omissions were not material. It also found the Defendants had not breached their fiduciary duty, because they disclosed all material facts and KII had paid a fair price for the stock. On the accounting claim, the jury found the expenses at issue were not infrequently occurring as defined by generally accepted accounting principles.

The Plaintiffs, including the Texas Plaintiffs, now challenge a litany of district court rulings issued both before and during the trial. This court exercises jurisdiction pursuant to 28 U.S.C. § 1291 and affirms in part and reverses in part.

III. DISCUSSION

A. Pine Bend Claims

The Plaintiffs challenge two district court rulings relating to their claims that, prior to the SPA, the Defendants withheld information about expansion plans for KII's Pine Bend Refinery. First, the Plaintiffs argue the district court improperly granted summary judgment against the Plaintiffs on their claim that the Defendants did not disclose KII's plans to expand the refinery to a crude processing capacity of 175,000 barrels per day ("B/D"). Second, the Plaintiffs assert the district court erred by denying their motion to amend the Pretrial Order to conform to evidence at trial indicating that just prior to the SPA, KII had plans to increase the refinery's capacity to 200,000 B/D.

1. Summary Judgment on the 175,000 B/D Claim

In a 1993 Pretrial Order,[3] the Plaintiffs asserted the following claim:

> As of the date of the stock sale, defendants knew but did not inform the selling shareholders that KII already was increasing, and making plans for further increasing, the crude processing capacity of the Pine Bend Refinery to

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[3] Although this 1993 Pretrial Order is not dated, file-stamped, or signed by the District Judge, and does not set a date for the pretrial conference, the parties appear to have treated this proposed order as defining their claims and defenses for purposes of the summary judgment motion. This court will similarly treat the 1993 Pretrial Order.

After the district court issued its summary judgment order in 1997, the parties drafted a new pretrial order (the "1998 Pretrial Order") which reflected the determinations made at summary judgment. Thus, the 1998 Pretrial Order looks much like the 1993 Pretrial Order, except that it does not include those claims which the district court had ruled insufficient as a matter of law. This 1998 Pretrial Order, which was subjected to the formalities normally required for such orders, constituted the final pretrial order prior to trial and was used to measure the dimensions of the trial. *See infra* note 9.

> approximately 145,000 B/D by June 1983; to approximately 155,000 B/D by the end of 1983; and to approximately 175,000 B/D within the next two years thereafter.
>
> ... Defendants' plans included delivering and selling the increased Pine Bend output into existing and new market territories to be accessed more effectively by the reversal of the direction of flow of the Williams Pipeline and by other means.

1993 Pretrial Order, 9-10 (first emphasis added). The Plaintiffs sought to recover for these alleged omissions under the following legal theories: (1) breach of contractual warranty; (2) breach of fiduciary duty; (3) common law fraud; and (4) securities fraud. *See id.* at 16.

The Defendants moved for summary judgment on each of the 145,000, 155,000, and 175,000 B/D claims. The district court denied summary judgment on the 145,000 and 155,000 B/D claims, allowing those claims to go to trial, but granted the Defendants' motion on the 175,000 B/D claim.

In its summary judgment order, the district court first posed the issue in these terms: "Is there enough evidence from which a reasonable jury could find that as of June of 1983 KII had firm plans to expand Pine Bend's capacity to 175,000 bpd within two years?" Summary Judgment Memorandum and Order, July 11, 1997, at 127-28 (emphasis added). In answering this question, the district court went on to rule,

> The court believes a reasonable jury could not find that the defendants in June of 1983 had reasonably firm or definite plans to expand Pine Bend's capacity to 175,000 bpd within two years. At most, the evidence sustains the inference that [KII] officials believed in early 1983 that the economic forecasts and other projections were sufficiently favorable that they should reconsider now increasing refinery capacity under two previ-

> ously defined cases.... The plaintiffs do not submit any evidence from which one can reasonably infer that as of the SPA the defendants had already decided on a specific schedule for expanding refinery capacity regardless of [the engineering firm] Litwin's engineering results and cost summaries. Instead, the evidence overwhelmingly indicates that the defendants remained uncertain about the timing, amount and type of any expansion and that any decision to expand remained contingent on among other things, Litwin's results. The mere decision to consider refinery expansion and to set parameters for estimating costs is not what the plaintiffs allege in this claim. They allege that the defendants planned to expand the refinery to 175,000 bpd within two years. Quite simply, the plaintiffs do not come forth with the evidence to sustain this allegation of "planned" expansion.

Id. at 128-29 (emphasis added).

The Plaintiffs appeal this decision on two grounds. First, the Plaintiffs contend the district court erroneously required evidence of "firm" or "definite" plans, even though neither the Plaintiffs' claim in the 1993 Pretrial Order nor the controlling law on any of their legal theories uses those terms. Second, the Plaintiffs assert that a reasonable jury could find that the evidence supported the exact claim articulated in the 1993 Pretrial Order, *i.e.*, KII was "making plans" for a 175,000 B/D expansion.

This court reviews a district court's grant of summary judgment de novo. *See Anderson* v. *Coors Brewing Co.*, 181 F.3d 1171, 1175 (10th Cir.1999). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "When applying this standard, we view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving

party." *Simms* v. *Oklahoma ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir.), *cert. denied*, -- U.S. --, 120 S. Ct. 53, 145 L.Ed.2d 46 (1999). This court has held that failure of proof of an essential element renders all other facts immaterial. *See Treff* v. *Galetka*, 74 F.3d 191, 195 (10th Cir.1996). Thus, to succeed on summary judgment on the 175,000 B/D claim, the Defendants must demonstrate that no material facts regarding this claim, or at least regarding any essential element of the claim, are in dispute and that these undisputed facts fail to prove as a matter of law any essential element of the claim.

In *Air-Exec Inc.* v. *Two Jacks Inc.*, this court noted that when parties to a lawsuit fail to object to or move to amend a pretrial order, that order "measures the dimensions of the lawsuit both in the trial court and on appeal." 584 F.2d 942, 944 (10th Cir.1978); *see also* Fed.R.Civ.P. 16(e) (the pretrial order "shall control the subsequent course of the action unless modified by a subsequent order"). For purposes of summary judgment, therefore, the pretrial order coupled with the governing law establish the quantum of evidence required for the Plaintiffs to survive the Defendants' summary judgment motion on the 175,000 B/D claim.

In the 1993 Pretrial Order, the Plaintiffs asserted KII was "making plans" to expand the refinery's crude capacity to 175,000 B/D by the end of 1985. As this order plots the dimensions of the Plaintiffs' claim, they must reference sufficient record evidence for this court to conclude a reasonable jury could find KII was "making plans" for this 175,000 B/D expansion by the end of 1985. Additionally, although each of the Plaintiffs' four legal theories impose upon the Defendants slightly different disclosure standards,[4] this court can look to

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[4] Due to the terms of the SPA, the breach of warranty claim requires the Plaintiffs to prove a failure to disclose any "event, condition, or state of facts ... which if fully disclosed might materially affect the valuation of stock of [KII] by a prudent and knowledgeable investor...." SPA, § 5(d)

the least burdensome of these standards to determine whether any of the claims should have gone to trial. Among these four slightly different disclosure standards, the least rigorous for the Plaintiffs is that flowing from their breach of warranty claim. Thus, in order for even the warranty claim to survive summary judgment, this court, viewing the evidence before the district court at summary judgment in a light most favorable to the Plaintiffs, must answer the following three questions in the affirmative. (1) Could a reasonable jury find that at the time of the SPA, KII was making plans to expand Pine Bend's crude refining capacity to 175,000 B/D by the end of 1985? (2) If so, did KII withhold this information from the Plaintiffs prior to the SPA? (3) Might knowledge of this information materially affect the valuation of KII stock by a prudent and knowledgeable investor?

Without needing to address the last two of these three inquires, this court concludes that a reasonable jury could not have found KII was making plans for a 175,000 B/D expan-

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(emphasis added). Under their breach of fiduciary duty claim, the Plaintiffs must demonstrate that the Defendants withheld some facts affecting the value or price of stock or any other matters which would tend to increase the value of the corporation's stock. *See Sampson* v. *Hunt*, 222 Kan. 268, 564 P.2d 489, 492 (1977). The common law fraud claim requires the Plaintiffs to show KII knowingly or recklessly withheld information to which a reasonable person would attach importance in determining at what price to sell KII stock, and that Plaintiffs did in fact rely on this non-disclosure to their detriment. *See McGuire* v. *Gunn*, 133 Kan. 422, 300 P. 654, 656 (1931) (defining common law fraud); *Griffith* v. *Byers Constr. Co.*, 212 Kan. 65, 510 P.2d 198, 205 (1973) (establishing when an omission or non-disclosure constitutes a material fact for purposes of common law fraud). Finally, to succeed on their securities fraud claim, the Plaintiffs must show a substantial likelihood the non-disclosed information would have been viewed by a reasonable investor as having significantly altered the total mix of information made available. *See* 17 CFR § 240.10b-5 (defining securities fraud under Rule 10b-5 of the Securities Exchange Act of 1934); *Basic Inc.* v. *Levinson*, 485 U.S. 224, 231, 108 S. Ct. 978, 99 L.Ed.2d 194 (1988) (establishing when a fact is material under 10b-5).

sion at the time of the SPA. In reaching this determination, we have reviewed all of the record evidence which might support the Plaintiffs' claim, though this court is not obligated to locate or inspect materials not referenced by the parties in their briefs.[5] *See Adler* v. *Wal-Mart Stores*, 144 F.3d 664, 672 (10th Cir.1998); *see also Gamble, Simmons & Co.* v. *Kerr-McGee Corp.*, 175 F.3d 762, 773 n. 5 (10th Cir.1999) ("In the absence of sufficient citation to record support for a party's allegations, we decline to search for the proverbial needle in a haystack.").

The crux of the Plaintiffs' 175,000 B/D expansion claim is this: as far as the Plaintiffs knew, at the time of the SPA the Pine Bend Refinery utilized two crude units, No. 1 having a capacity of approximately 40,000 B/D and No. 2 having a capacity of approximately 90,000 B/D, for a total capacity of approximately 130,000 B/D. Unbeknownst to the Plaintiffs, however, KII was in the process of revamping unit No. 2 to a capacity of 110,000 B/D, while also working with Litwin Engineering ("Litwin") either to expand No. 1 to a 65,000 B/D capacity or to replace No. 1 with a new unit with a 65,000 B/D capacity. The Litwin project, combined with the revamp of unit No. 2, would allegedly result in a total capacity of 175,00 B/D, all of which information the Plaintiffs claim the Defendants hid from them prior to the SPA.

In opposing summary judgment on the 175,000 B/D claim, the Plaintiffs also rely heavily upon evidence that KII had struck a deal with the Williams Pipeline Company to reverse the flow of the Williams pipeline, but failed to inform the Plaintiffs of that agreement. The Plaintiffs maintain that the Williams reversal provided KII access to new markets for gasoline, thus indicating a plan to increase crude production capacity to 175,000 B/D. Evidence of general market expansion, however, does not specifically support the Plaintiffs'

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[5] Attached as an appendix to this opinion is a detailed list and discussion of the relevant evidence. *See infra* Appendix.

discrete claims for crude production expansion to 145,000; 155,000; 175,000; or 200,000 B/D. Indeed, to succeed on each of these claims, the Plaintiffs must direct this court to evidence of distinct plans to expand production capacity to each specifically alleged number of barrels per day, independent of evidence demonstrating efforts to expand general markets. When the Plaintiffs' stated claims so discretely reference 145,000 B/D, 155,000 B/D, and 175,000 B/D and further include anticipated dates of accomplishment for each expansion, they must provide evidence differentiating between the three claims. With respect to the 175,000 B/D claim, therefore, the Plaintiffs need to demonstrate evidence of the alleged plan through Litwin to expand Pine Bend's crude production capacity to 175,000 B/D.[6]

Viewing the relevant evidence in a light most favorable to the Plaintiffs, this court concludes that a reasonable jury could not find that prior to the SPA KII was making plans to expand Pine Bend's crude production to 175,000 B/D. At most, KII was merely contemplating this expansion possibility. Although the evidence does not reveal definitively whether KII ever contracted with Litwin to conduct design and cost stud-

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[6] The Appendix to this opinion, therefore, does not include any evidence of the alleged secret deal to reverse the Williams pipeline. See infra Appendix. The summary judgment order did not in fact preclude introduction of such evidence, because, as discussed above, that evidence also was relevant to the 145,000 and 155,000 B/D claims; indeed, the Plaintiffs presented such evidence at trial.

Similarly, the Appendix does not include the "doom and gloom" evidence which the Plaintiffs contend is also relevant to the 175,000 B/D claim. See infra Appendix. In short, the Plaintiffs allege the Defendants, while secretly planning for these expansions, communicated to the Plaintiffs dire predictions about the economic future of the refinery. This court need not consider such evidence to determine whether the Plaintiffs presented a material issue of fact regarding the existence of a 175,000 B/D expansion plan, because this evidence really bears on the separate issue of whether the Defendants withheld information about the alleged expansion. As stated above, this court need not address that question.

ies for this possible expansion, this court concludes that a reasonable jury could infer such a contract existed and even that Litwin performed this work. What a reasonable jury could not find, however, is that KII's contracting with Litwin to perform preliminary design and cost studies rises to the level of KII's making plans for this expansion. According to Merriam-Webster's Collegiate Dictionary, "to make plans" is synonymous with "to plan," which is defined as "to devise or project the realization or achievement of." Merriam-Webster's Collegiate Dictionary (10th ed., 1993) (emphasis added). "To study," however, merely means "to consider attentively or in detail." Id. (emphasis added). Resort to dictionaries thus confirms that which common parlance indicates: "studying" is not "planning," and, in this case, the term "making plans" connotes a higher level of commitment to the expansion than mere evidence of initial cost and design studies indicate.

Moreover, the totality of the remainder of the evidence provides an even stronger sense that KII's approach to this potential 175,000 B/D expansion was rather tentative, at least at the time of the SPA. In November of 1983, five months after the SPA, KII announced plans for a more aggressive expansion to over 200,000 B/D, a plan predicated on an entirely different technical approach than the ones studied by Litwin to effectuate the 175,000 B/D expansion. This approximately 200,000 B/D expansion envisioned adding a third crude processing unit, as opposed to the options studied by Litwin of either replacing or upgrading existing unit No. 1. Despite the 200,000 B/D expansion announcement, one month later KII was still merely considering the lesser, intermediate step of expanding to 175,000 B/D, as evidenced by an announcement at the December 1983 Board of Directors Meeting that KII was continuing to analyze the technical and economic feasibility of the 175,000 B/D expansion options studied by Litwin. It was only in February 1984, eight months after the SPA, that KII apparently committed in any way to an ap-

proximately 175,000 B/D expansion.[7] In sum, the evidence before the district court at summary judgment, viewed in a light most favorable to the Plaintiffs, shows at most that KII was considering an expansion to 175,000 B/D when the parties signed the SPA, but it does not demonstrate that KII was actually making plans for this expansion, as the Plaintiffs alleged in the 1993 Pretrial Order. Thus, this court affirms the district court's grant of summary judgment for the Defendants on the 175,000 B/D expansion claim.

Alternatively, the evidence in no way establishes KII had firm plans for a 175,000 B/D expansion at the time of the SPA and, although the district court erred in requiring evidence of such firm plans, the Plaintiffs invited this error and thus cannot appeal it. This court has long recognized the equitable doctrine of invited error. *See United States* v. *Johnson*, 183 F.3d 1175, 1179 n. 2 (10th Cir.1999); *Air-Exec.*, 584 F.2d at 944. "The invited error doctrine prevents a party from inducing action by a court and later seeking reversal on the ground that the requested action was error." *Johnson*, 183 F.3d at 1178-79 n. 2.

Here, the Plaintiffs induced the district court at the summary judgment stage to view their claim as asserting KII had made "firm plans" for a 175,000 B/D expansion. Both the Plaintiffs' expert witness, in his report, and their Brief in Opposition to the Defendants' Motion for Summary Judgment stated KII had "firm plans" for this expansion in June of 1983. One important purpose of written briefs and expert opinion evidence is to focus the court's attention on the specific nature of the legal theories and factual allegations at issue in a case. By claiming these "firm plans," the Plaintiffs themselves induced the district court to focus on whether KII had made such firm plans. *Cf. Air-Exec.*, 584 F.2d at 944

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[7] This February 1984 commitment, however, was actually to expand Pine Bend's crude capacity merely to 170,000 B/D, something less than the amount pleaded by the Plaintiffs.

(holding defendants could not appeal an inferential admission they had made in the pretrial order, as the pretrial order "measures the dimensions of the lawsuit").

This court acknowledges that it is the pretrial order which measures the dimensions of a lawsuit, and not a summary judgment brief or an expert's testimony, and therefore the district court erred in requiring evidence of "firm plans" rather than "making plans." Nonetheless, the Plaintiffs induced the district court into making this error, and thus they cannot challenge this heightened evidentiary requirement on appeal. Because the evidence before the district court on summary judgment, viewed in a light most favorable to the Plaintiffs, provides no indication whatsoever that KII had made firm plans to expand Pine Bend to 175,000 B/D at the time of the SPA, this court affirms the district court's grant of summary judgment.

2. The Motion to Amend the Pretrial Order to Add a 200,000 B/D Expansion Claim

At the close of their case, the Plaintiffs moved to amend the 1998 Pretrial Order to conform to the evidence, asserting the Defendants had impliedly consented to the trial of a new claim: that the Defendants failed to disclose KII's pre-SPA plan to expand Pine Bend's capacity to 200,000 B/D. The district court denied that motion for several reasons. First, it resolved that the evidence at trial presented no new issues at all, but instead was the same evidence the Defendants presented at summary judgment to show the Plaintiffs always knew about KII's ideas for expansion. The district court thus concluded the Defendants did not consent to the trial of a new claim. Second, the district court reasoned that because the subject evidence was also relevant to the claims already being tried, the Plaintiffs could not rely on that evidence to amend the 1998 Pretrial Order in conformity with the evidence. Third, the district court determined its reasoning for granting the Defendants summary judgment on the 175,000 B/D claim applied with equal force to any possible 200,000 B/D claim.

Finally, the district court concluded that forcing the Defendants to defend this new claim would unfairly disadvantage them. This court reviews the district court's denial of the motion to amend for an abuse of discretion. *See Trierweiler v. Croxton & Trench Holding Corp.*, 90 F.3d 1523, 1543 (10th Cir.1996).

During defense counsel's cross-examination of William H. Hanna, the President of KII at the time of trial, Hanna stated the following:

> We really wanted very badly to do this, to be able to reverse [the Williams] pipeline, because we could see--as you've heard earlier, starting in '76 there was more product, more product, more product. We weren't naive. We knew we were heading to 200,000 barrels a day so we were looking for every outlet.

Later in the trial, the following exchange occurred between defendant David Koch and Plaintiffs' counsel during their direct examination:

> Q: Did you know in the fall of 1982 that the Pine Bend Refinery was heading to 200,000 barrels a day?
>
> A: Yes, Bernie Paulson had been talking about expanding the refinery to that number for many years.
>
> Q: This was the--Paulson starting talking about this--
>
> A: Yeah, in the 1970[s].
>
> Q: in the 1970[s]. '70s. He'd advocated 200,000. Right?
>
> A: Well, it was a long-term objective, yes.
>
> . . . .
>
> Q: That you, David Koch, then did know in the fall of 1982 that the company was heading to 200,000 barrels a day?
>
> A: Yes, at some distant point in the future. I mean, we were trying to get there eventually.

. . . .

A: The 200,000 barrels a day was in the future. Now, I don't think we had any idea of--during the early 80s at what point we were going to reach 200,000 barrels a day, but it was almost certain that sooner or later we were going to get there.

In addition, Plaintiffs' counsel questioned both Bernard Paulson and William Koch about this alleged 1982 plan for expansion to 200,000 B/D.

The Plaintiffs contend that by eliciting Hanna'stestimony and failing to object to the other testimony, the Defendants impliedly consented to the trial of a new claim, i.e., that the Defendants failed to disclose to the Plaintiffs KII's 200,000 B/D expansion plan. Because of this implied consent, the Plaintiffs argue, the district court erred by denying them leave to amend the 1998 Pretrial Order to include this additional claim.

Federal Rule of Civil Procedure 15(b) provides:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment....

Fed.R.Civ.P. 15(b). A party impliedly consents to the trial of an issue not contained within the pleadings either by introducing evidence on the new issue or by failing to object when the opposing party introduces such evidence. *See Hardin* v. *Manitowoc-Forsythe Corp.*, 691 F.2d 449, 457 (10th Cir.1982).

Contrary to the Plaintiffs' characterization of Hanna's and David Koch's testimony, the Defendants neither introduced evidence on a new issue nor failed to object to that type of evidence. Indeed, this testimony presented anything but a

new issue. Both before and during the course of this litigation, the Plaintiffs were fully aware that beginning in 1977, KII President Bernard Paulson had lobbied to expand Pine Bend to a capacity of 200,000 B/D. The Defendants presented evidence at summary judgment demonstrating the Plaintiffs possessed knowledge of Paulson's aspiration to expand Pine Bend's capacity to 200,00 B/D. *See* 6A Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1527, at 287-89 (1990) ("[I]f the evidence or issue was within the knowledge of the party seeking modification [of the pretrial order] at the time of the [pretrial conference] ... then it may not be allowed.") Moreover, in both the 1993 and 1998 Pretrial Orders, the Defendants attempted to refute the Plaintiffs' non-disclosure claim by contending that the Plaintiffs were aware of KII's engagement in a process for expansion. Thus, this longstanding objective to expand Pine Bend to a 200,000 B/D capacity was both known by the Plaintiffs and raised in the pleadings.

The Plaintiffs now argue that prior to the early 1980s, KII had abandoned Paulson's idea for expansion, and therefore, the trial testimony pointed to some new 200,000 B/D expansion plan first proposed in 1982 and about which the Defendants were not informed. The only fair, contextual reading of the testimony, however, does not support the Plaintiffs' interpretation. Both Hanna and David Koch unequivocally stated that this 1982 200,000 B/D expansion objective had originated with Paulson back in 1976. Therefore, the district court did not abuse its discretion in concluding that the Defendants had not consented to the trial of an issue not raised in the pleadings.

In addition, Hanna's and David Koch's testimony about the 200,000 B/D expansion plan was relevant to issues already being tried. "When the evidence claimed to show that an issue was tried by consent is relevant to an issue already in the case, and there is no indication that the party presenting the evidence intended thereby to raise a new issue, amend-

ment may be denied in the discretion of the trial court." *Hardin*, 691 F.2d at 457; *see also Dole* v. *Mr. W Fireworks, Inc.*, 889 F.2d 543, 547 (5th Cir.1989) ("The evidence that [plaintiff] alleges to have shown implied consent was also relevant to the other issues at trial and cannot be used to imply consent to try the present issue."). The Plaintiffs' awareness of all KII's ideas for expanding Pine Bend was relevant to whether the Plaintiffs were unaware of the purported 145,000 and 155,000 B/D expansions, claims that were being tried. Undoubtedly, that is why defense counsel elicited this testimony, not because the Defendants intended to raise a new issue. The Defendants were merely attempting to demonstrate that KII embraced a healthy corporate philosophy to act aggressively, move ahead, and increase market share, a philosophy of which the Plaintiffs were aware. The evidence regarding the 200,000 B/D expansion goal was introduced simply to illustrate the Plaintiffs' knowledge of that philosophy and thus of the two lesser expansions, not to inject evidence of a specific or discrete plan, as argued by the Plaintiffs. The district court, therefore, did not abuse its discretion in denying the Plaintiffs' motion to amend the 1998 Pretrial Order.

Alternatively, the Plaintiffs argue that even if the Defendants did not consent to trial of a 200,000 B/D expansion claim, the district court still should have granted the Plaintiffs' motion to amend the 1998 Pretrial Order because the Defendants failed to show that they would be prejudiced by the trial of the new claim.[8] This argument, however, relies on

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[8] Federal Rule of Civil Procedure 15(b) provides,

> If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits.

an incorrect interpretation of the district court's reasoning. The district court did not conclude merely that the Defendants failed to consent, but also that the evidence at issue presented no new claim. Although Rule 15(b) does allow a court, under certain circumstances, to amend pleadings to conform to evidence even when the opposing party objected to that evidence, application of any portion of Rule 15(b) is appropriate only when an issue "not raised by the pleadings" has, in fact, been presented. Fed.R.Civ.P. 15(b). As discussed above, the district court did not abuse its discretion in concluding the testimony about the longstanding aspiration to expand Pine Bend to 200,000 B/D presented no issues not raised in the pleadings, both because the Plaintiffs were previously aware of this evidence and because this evidence was relevant to other issues already being tried. Rule 15(b), therefore, does not apply at all to this testimony, and this court need not undertake a Rule 15(b) prejudice analysis with respect to that testimony. Thus, we affirm the district court's denial of the Plaintiffs' motion to amend the pleadings to conform to the evidence.

B. Accounting Claims

During discovery, the Plaintiffs obtained, for the first time, a document entitled "Extraordinary Items 1982," a list of company expenses and other accounting items from 1982 prepared by KII's controller, Milton Hall. After discovering the existence of Hall's list, the Plaintiffs were granted leave of court to amend their complaint, adding allegations about KII's accounting treatment of the items on Hall's list. They contended the Defendants' 1982 financial statements, upon which the Plaintiffs relied when valuing KII stock for the

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Fed.R.Civ.P. 15(b); *see also Hardin* v. *Manitowoc-Forsythe Corp.*, 691 F.2d 449, 457 (10th Cir.1982) ("Even where there is no consent, and objection is made at trial that evidence is outside the scope of the pretrial order, amendment may still be allowed unless the objecting party satisfies the court that he would be prejudiced by the amendment.").

SPA, failed to identify the items on Hall's list as non-recurring. Because these expenses were, according the Plaintiffs, actually non-recurring in nature, the Plaintiffs undervalued the company by approximately $283 million.

The Plaintiffs sought recovery for these alleged mischaracterizations as a violation of both the Full Disclosure and the Generally Accepted Accounting Principles ("GAAP") warranties contained in the SPA, as well as the Defendants' fiduciary duty of full disclosure. With respect to these accounting claims, the Plaintiffs raise three issues on appeal: (1) whether the district court improperly required the Plaintiffs to prove, as a predicate for all of their accounting claims, that these expenses were "unusual" or "infrequently occurring" as defined by GAAP; (2) whether the district court abused its discretion by failing to amend the 1998 Pretrial Order[9] to make clear that the accounting claims did not hinge on the jury's finding the items were "unusual" or "infrequently occurring" as defined by GAAP; and (3) whether the district court erroneously denied the Plaintiffs an opportunity to present certain rebuttal testimony to the defense theory on these claims.

1. Requiring Proof of "Unusual" or "Infrequently Occurring" Losses Under GAAP

In the 1998 Pretrial Order, the Plaintiffs set forth the following claims:

> KII employed accounting methods that were designed intentionally to understate KII's earnings and assets in the financial statements....
>
> To diminish its apparent earnings, KII therefore employed the following accounting practice which violated

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[9] Unlike the 1993 Pretrial Order, this order was file-stamped, signed by the district court, and subject to a Pretrial Conference. See supra note 3. Indeed, this was the final Pretrial Order prior to trial, which incorporated the summary judgment rulings and ultimately controlled the course of the trial.

> GAAP and constituted breaches of both warranties in the Stock Purchase and Sale Agreement (quoted above): KII failed to disclose its unusual and/or infrequently occurring losses. KII categorized these losses as recurring expenses or depreciation, thereby artificially reducing what appeared to be KII's ordinarily recurring income.
>
> (emphasis added)

Later that year, in ruling on a defense motion *in limine* seeking to exclude some of the Plaintiffs' expert testimony on the accounting claims, the district court responded to the parties' arguments about the parameters of these claims: "If the plaintiffs intend to pursue an allegation that the defendants failed to disclose information on items that are neither unusual or infrequently occurring under GAAP, then the court rules that such an allegation or theory is outside the plaintiffs' accounting claim as pleaded in the pretrial order...." The district court looked to the 1998 Pretrial Order, which articulated only one factual basis for the Plaintiffs' accounting claim regarding these expenses: "KII failed to disclose its unusual and/or infrequently occurring losses." Additionally, the district court noted the Plaintiffs "chose to define these losses with accounting parlance borrowed from GAAP." Thus, the district court concluded the Plaintiffs must prove the Defendants failed to disclose "unusual" or "infrequently occurring" items, as defined by GAAP, to prevail on their accounting claims and therefore excluded any expert testimony on disclosure requirements for losses that were not "unusual and/or infrequently occurring."

At trial, Alfred Eckert, a former Goldman Sachs investment banker who led the team hired by William Koch to value KII for purposes of the SPA, explained that when valuing a company's stock, he would add back into the company's earnings certain non-recurring losses. He further testified that his decision to add back these items depended not on generally-accepted accounting principles, but simply on whether, in his opinion, the losses likely would recur. On the

Defendants' motion and over the Plaintiffs' objection, the district court then instructed the jury that the "plaintiffs' accounting claim is limited to the defendants' failure to disclose items that are unusual and/or infrequently occurring as those terms are defined by [GAAP]" and to disregard Eckert's testimony addressing the treatment of non-recurring items that do not fall within these definitions. The district court also issued an order (the "May 12, 1998 Order") consistent with these instructions resolving that the accounting claims were predicated on the Plaintiffs' ability to prove the losses at issue were unusual or infrequently occurring under GAAP. Finally, both the instructions which the court gave the jury at the close of the trial and the jury's verdict form all indicated that to prevail on their accounting claim, under any legal theory, the Plaintiffs were required to prove the Defendants failed to disclose infrequently occurring losses as defined by GAAP.

On appeal, the Plaintiffs challenge the district court's orders and actions hinging their accounting claims on proof that the items at issue were unusual or infrequently occurring as defined by GAAP. This court reviews for abuse of discretion a district court's exclusion of evidence or issues from trial on the basis of a properly-drawn, detailed pretrial order. *See Grant* v. *Brandt*, 796 F.2d 351, 355 (10th Cir.1986).

It is first important to note that the failure to disclose "unusual and/or infrequently occurring losses" constitutes the sole factual basis pleaded by the Plaintiffs in the 1998 Pretrial Order to support their claims regarding the Defendants' accounting treatment of KII expenses. Because a pretrial order defines the scope of an action for trial, the Plaintiffs were thus obligated to prove this one specific factual contention to prevail on their accounting claims. *See* Fed.R.Civ.P. 16(e) (providing that a pretrial order entered after a pretrial conference "shall control the subsequent course of the action unless modified by a subsequent order"); *Trujillo* v. *Uniroyal Corp.*, 608 F.2d 815, 817 (10th Cir.1979) ("When issues are defined by the pretrial order, they ought to be adhered to in the ab-

sence of some good and sufficient reason." (citation and internal quotation marks omitted)). The question then is whether the district court properly determined the Plaintiffs needed to prove the losses were unusual or infrequently occurring as defined by GAAP, or whether infrequent occurrence under some other standard would have sufficed.

As the Plaintiffs point out, this court has recognized that a pretrial order "should be 'liberally construed to cover any of the legal or factual theories that might be embraced by [its] language.'" *Trujillo*, 608 F.2d at 818 (quoting *Rodrigues* v. *Ripley Indus., Inc.*, 507 F.2d 782, 787 (1st Cir.1974)). A careful reading of this court's cases reviewing trial courts' construction of pretrial orders, however, reveals that a district court may more strictly construe a pretrial order when that order has been refined over time, properly drawn, and drafted with substantial specificity. *See, e.g., Cleverock Energy Corp.* v. *Trepel*, 609 F.2d 1358, 1361-62 (10th Cir.1979) (affirming trial court's exclusion of breach of fiduciary duty issue as beyond the scope of the pretrial order when the objecting party "failed to take timely advantage of an opportunity to enlarge upon the general terms used in the order"); *Rigby* v. *Beech Aircraft Co.*, 548 F.2d 288, 291-92 (10th Cir.1977) (affirming trial court's exclusion of evidence of defects in 40-gallon fuel cells of airplane when the plaintiffs' answers to interrogatories and the pretrial order consistently alleged defects only in the plane's 31-gallon fuel cells). On the other hand, this court has more liberally construed pretrial orders when the orders are not drafted with substantial care and specificity. *See, e.g., Whalley* v. *Sakura*, 804 F.2d 580, 582-83 (10th Cir.1986) (liberally construing pretrial order when "pretrial order ... stated the claims of the plaintiff in general terms"); *Trujillo*, 608 F.2d at 817- 19 (broadly construing a pretrial order that was "not properly drawn, [was] not definitive, specific, complete or detailed").

In *Cleverock Energy* this court elaborated on the reasons for allowing two divergent approaches to construing pretrial orders:

> This court is acutely aware of the evils of the inflexible application of a pretrial order. These evils are aggravated when the pretrial order is unrefined. We recently held [in *Trujillo*] that a coarse pretrial order could not be narrowly applied to exclude one of three subtheories fairly encompassed within its general terms. However, we should not lose sight of the important policies behind the pretrial order mechanism, i.e., the narrowing of issues to facilitate an efficient trial and to avoid surprise.

Cleverock Energy, 609 F.2d at 1361-62 (citations omitted). Ultimately, the court held, "We cannot in these circumstances conclude that the trial judge, who presided over the pretrial conferences of this extensive litigation and had before him the pleadings, motions and various pretrial statements of the parties, abused his discretion in striking the ... issue as beyond the scope of the litigation." *Id.* at 1362. In sum, while pretrial orders generally should be construed liberally, a district court may more strictly construe such an order when the party favoring a liberal construction has had ample opportunity to refine the order and when the final order is properly drawn and substantially specific.

The Plaintiffs do not allege that the 1998 Pretrial Order was improperly drawn. Indeed, a pretrial conference was held on August 25, 1997, after which a proposed order was drafted. *See* Fed.R.Civ.P. 16(d). The district court signed the 1998 Pretrial Order on February 6, 1998. *See* Fed.R.Civ.P. 16(e). Further, this court has noted a proper pretrial order is "definitive," "sharpen[s] and simplifie[s] the issues to be tried," and "represents a complete statement of all the contentions of the parties." *Trujillo*, 608 F.2d at 817 (citations and internal quotations omitted). The 1998 Pretrial Order in this case fits that bill, as many years of draft pretrial orders, dis-

trict court orders, and discovery served to focus the legal and factual contentions of the parties and culminated in this final pretrial order. Additionally, because numerous draft pretrial orders were produced over the many years of this litigation, the Plaintiffs cannot claim that they lacked opportunities to draft the order to clearly encompass their claims. Because the 1998 Pretrial Order was properly drawn, with relative specificity and definitiveness, and because the Plaintiffs had ample opportunity to refine the order, the district court was not required to afford the Plaintiffs overly- generous leeway in its construction of their accounting claims.

Indeed, a contextual reading of the 1998 Pretrial Order leads this court to conclude that the district court did not abuse its discretion in determining that the Plaintiffs' accounting claims predicated recovery on their ability to prove the losses at issue were unusual or infrequently occurring as defined by GAAP. Again, the 1998 Pretrial Order frames this accounting claim in the following terms: "To diminish its apparent earnings, KII therefore employed the following accounting practice which violated GAAP and constituted breaches of both warranties in the Stock Purchase and Sale Agreement (quoted above): KII failed to disclose its unusual and/or infrequently occurring losses." (emphasis added). As the district court noted in its May 12, 1998 Order, the words "unusual and/or infrequently occurring" are terms of art used in GAAP literature, which the Plaintiffs earlier referenced at the summary judgment stage. Furthermore, this lone factual allegation mentioning unusual and infrequently occurring losses immediately follows a portion of the sentence which asserts a GAAP violation.

To support their reading of the 1998 Pretrial Order, the Plaintiffs point to the conjunction "and" between the asserted GAAP violation and the alleged breaches of two warranties, as well as the reference to "both warranties." This language, however, bolsters, rather than subverts, the district court's construction of the pretrial order. The first of the two refer-

enced warranties (the "GAAP Warranty") warranted that the financial statements disclosed to the Plaintiffs as of December 31, 1981 and December 31, 1982 "fairly present the ... financial condition ... of ... [KII] ... in accordance with generally accepted accounting principles...." The second warranty (the "Full Disclosure Warranty") stated that since December 31, 1982, the Defendants had provided all information "which if fully disclosed might materially affect the valuation of the stock of [KII]...." Although only the first of these warranties explicitly required GAAP compliance, by pleading that the Defendants' accounting practices violated GAAP "and" "both warranties," the Plaintiffs appear to assert that because these practices violated GAAP they necessarily violated the Full Disclosure Warranty as well as the GAAP Warranty. Otherwise, the initial reference to the GAAP violation which precedes the word "and" would be superfluous, given the factual allegation using GAAP terminology which follows. Thus, the claim ties GAAP requirements to both warranties, as well as to the words "unusual" and "infrequently occurring."

Similarly, this court rejects the Plaintiffs' argument that because they separately pleaded breach of fiduciary duty, along with breach of these two warranties, the court should not read the words "unusual" and "infrequently occurring" as GAAP terms of art when applied to their breach of fiduciary duty claim. In its May 12, 1998 Order, the district court responded to this argument: "There is no reasonable construction of this pretrial order that is so liberal as to permit a court to read terms of art in the same sentence as having two different meanings simply because the party subsequently asserts an alternative legal theory." This court concurs with that assessment. Further, as the district court noted in that May 12, 1998 Order, the Plaintiffs failed to exercise their drafting prerogative to include a different, alternative, or additional definition in the 1998 Pretrial Order. Instead, they effectively expressed their satisfaction to be bound by the GAAP definition.

Finally, in analyzing the 1998 Pretrial Order, the district court properly considered the parties' motions, briefs, and arguments regarding the accounting claims that came before it throughout the thirteen years in which that court presided over this litigation. The district court stated, "[T]he plaintiffs did not allude during the summary judgment proceedings to any position that their two legal theories on the accounting claim were based on alternative meanings to 'unusual and/or infrequently occurring losses.' " The record bears out the accuracy of this statement. For example, in its Memorandum in Opposition to the Defendant's Motion for Summary Judgment, the Plaintiffs assert, "Thus, Koch ... failed – contrary to GAAP – to disclose its 1982 writeoffs as unusual, non-recurring expenses." (emphasis added).

In conclusion, this court holds that the district court, with its thirteen years of reading and listening to the parties' assertions and arguments concerning these accounting claims, did not abuse its discretion when it construed a properly drawn, refined, and specific pretrial order as excluding any accounting claims not predicated on proof that the losses at issue were unusual or infrequently occurring by GAAP definitions.

2. The District Court's Failure to Amend the Pretrial Order

The Plaintiffs further argue the district court erred by failing to amend the 1998 Pretrial Order to permit the trial of accounting claims not predicated on proof of unusual or infrequently occurring losses as defined by GAAP. Although the Plaintiffs never formally moved for an amendment of the 1998 Pretrial Order, this court "interpret[s] the assertion of an issue not listed in the pretrial order as the equivalent of a formal motion to amend the order...." *Trierweiler*, 90 F.3d at 1543. Thus, by opposing the Defendants' *in limine* motion, eliciting Eckert's testimony, and opposing the Defendants' motion to strike that testimony as beyond the scope of the 1998 Pretrial Order, the Plaintiffs effectively moved for an amendment of the order.

This court reviews a district court's failure to amend a final pretrial order for an abuse of discretion. *See id.* Federal Rule of Civil Procedure 16(e) provides, "The order following a final pretrial conference shall be modified only to prevent manifest injustice." Fed.R.Civ.P. 16(e). Furthermore, the burden of demonstrating manifest injustice falls upon the party moving for modification. *See R.L. Clark Drilling Contractors, Inc.* v. *Schramm, Inc.*, 835 F.2d 1306, 1308 (10th Cir.1987). This court considers the following factors when faced with a challenge to a district court's exclusion of an issue by failing to amend a pretrial order: (1) prejudice or surprise to the party opposing trial of the issue; (2) the ability of that party to cure any prejudice; (3) disruption to the orderly and efficient trial of the case by inclusion of the new issue; and (4) bad faith by the party seeking to modify the order.[10] *Cf. Roberts* v. *Roadway Express, Inc.*, 149 F.3d 1098, 1108 (10th Cir.1998); *Smith* v. *Ford Motor Co.*, 626 F.2d 784, 797 (10th Cir.1980). This court should also consider whether the party favoring amendment of the pretrial order formally and timely moved for such modification in the trial court. When a party fails to formally move for modification, it neglects to

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[10] The Plaintiffs contend the district court was required to consider these factors and its failure to do so itself constitutes an abuse of discretion. This court has never imposed such a requirement upon a district court when deciding whether to amend a pretrial order or allow evidence or issues outside the pretrial order to be presented; rather, we have always discussed these factors as matters which this court should consider to determine if the district court's decision constitutes an abuse of discretion. *See Roberts* v. *Roadway Express, Inc.*, 149 F.3d 1098, 1108 (10th Cir.1998); *Smith* v. *Ford Motor Co.*, 626 F.2d 784, 797 (10th Cir.1980). Thus, the district court's failure to make explicit findings under these four factors does not render its decision an abuse of discretion. The argument raised here by the Plaintiffs is particularly disingenuous, given their own failure to formally move to amend the order. The Plaintiffs simply cannot claim an abuse of discretion by the district court for not reciting the factors for consideration of a motion to amend a pretrial order when they failed to formally make such a motion.

focus the trial court's attention on the factors informing the amendment determination and generally prevents the creation of an adequate record as to the other four factors, thus limiting our effectiveness in reviewing the trial court's decision. *Cf. Hullman* v. *Board of Trustees of Pratt Community College*, 950 F.2d 665, 667-68 (10th Cir.1991). The failure to formally move to amend the 1998 Pretrial Order in this case resulted in exactly those consequences. This court must therefore independently surmise the import of amending the pretrial order to allow the trial of accounting claims not theretofore made.

Allowing the Plaintiffs to pursue any accounting claims without having to prove the expenses at issue were unusual or infrequently occurring as defined by GAAP would have significantly prejudiced and surprised the Defendants. When the district court issued its March 1998 *in limine* order, it fully apprised all parties of its understanding of the pretrial order and the parameters of the accounting claims for trial. The Defendants undoubtedly relied upon that ruling to prepare their own presentation of evidence as well as anticipate the Plaintiffs' case. As a consequence, the Plaintiffs' sudden attempt to inject into the trial evidence which the *in limine* order had precluded necessarily surprised the Defendants. Additionally, a proper defense of these essentially new accounting claims would have justified a mid-trial reopening of discovery, the addition of new witnesses, and further motions and briefings.[11] After spending thirteen years honing their defenses,

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[11] Even if this court construes the Plaintiffs' opposition to the *in limine* order as the equivalent of a motion to amend the pretrial order and thus views the surprise and prejudice from that point in time rather than from the elicitation of evidence during trial, the Defendants still would have suffered the prejudice of having just four months to prepare defenses to legal theories which the pleadings up until that point had failed to articulate. Furthermore, and as discussed below, analysis of the other factors firmly supports our conclusion that the district court acted within its discretion in not amending the 1998 Pretrial Order.

this sudden amendment of the 1998 Pretrial Order would have significantly prejudiced the Defendants. *Cf. Joseph Mfg. Co.* v. *Olympic Fire Corp.*, 986 F.2d 416, 420 (10th Cir.1993) (stating that defendant's failure to raise specific defense at an earlier possible juncture "cuts deeply against his claim of manifest injustice"). Although the court could have allowed the Defendants to undertake this additional work in order to cure the prejudice of injecting new issues into the trial, to do so might have so severely disrupted the orderly and efficient course of an ongoing trial that we cannot say the district court's refusal was an abuse of discretion. Finally, the Plaintiffs' neglect in not formally moving for amendment of the pretrial order weighs against overturning the district court's decision. An analysis of the applicable factors leads this court to conclude the Plaintiffs have not demonstrated that manifest injustice resulted from the district court's failure to amend the 1998 Pretrial Order and correspondingly they have failed to demonstrate the district court abused its discretion in not amending that order.

3. The Rebuttal Testimony

During the Defendants' case, three defense witnesses testified that KII was by nature a risk-taking company and the losses at issue resulted from risky ventures. With this testimony, the Defendants sought to demonstrate that these losses did not constitute unusual or infrequently occurring losses under GAAP definitions. Because those definitions account for "the environment in which the entity operates," the Defendants presented testimony that KII operated within a business environment in which it routinely took risks and suffered resulting losses. In addition, according to the Plaintiffs, one of these defense witnesses, Lynn Markel, on cross-examination disputed the testimony of Milton Hall, KII's controller, about some of the facts underlying the items on Hall's list of "Extraordinary Items," which had triggered the Plaintiffs' accounting claims.

The Plaintiffs then sought to recall one of their accounting witnesses, Gary Gibbs, on rebuttal. The Plaintiffs proffered that this witness would testify the Defendants' interpretation of the GAAP definitions was incorrect and Markel's testimony disputing Hall was contradicted by the underlying documents and financial statements. The district court precluded this rebuttal testimony, concluding the Plaintiffs reasonably could have anticipated this defense theory and evidence in their case-in-chief.

The Plaintiffs now challenge that decision, arguing that prior to the testimony of these defense witnesses, the Defendants' theory "had always focused on the likely recurrence of a type of event or write-down." With the introduction of this testimony, the Plaintiffs assert, the Defendants' theory "suddenly twisted into whether [KII] was a type of company that had to report its non-recurring losses the same way as other companies." Thus, the Plaintiffs contend they were entitled to present rebuttal testimony to this new defense theory and the district court erred by denying them the opportunity to do so.

This court reviews for an abuse of discretion a district court's refusal to allow rebuttal testimony. *See Marsee* v. *United States Tobacco Co.*, 866 F.2d 319, 324 (10th Cir.1989). "[W]here the evidence rebuts new evidence or theories proffered in the defendant's case-in-chief, that the evidence may have been offered in the plaintiff's case-in-chief does not preclude its admission in rebuttal." *Bell* v. *AT & T*, 946 F.2d 1507, 1512 (10th Cir.1991). When plaintiffs, however, seek to rebut defense theories which they knew about or reasonably could have anticipated, the district court is within its discretion in disallowing rebuttal testimony. *See Comcoa, Inc.* v. *NEC Tel., Inc.*, 931 F.2d 655, 664 (10th Cir.1991) ("Because plaintiffs were warned that rebuttal evidence would be restricted and because they reasonably could have anticipated defendants' evidence ... [i]t was within the district court's discretion to disallow plaintiffs' rebuttal evi-

dence."); *Fashauer* v. *New Jersey Transit Rail Operations Inc.*, 57 F.3d 1269, 1287 (3d Cir.1995) (holding that district court acted within its discretion by precluding rebuttal testimony to that which reasonably could have been anticipated). This court in fact endows the district court with "broad discretion" in deciding whether to admit or exclude rebuttal evidence. *United States* v. *Olivo*, 80 F.3d 1466, 1470 (10th Cir.1996); *see also Geders* v. *United States*, 425 U.S. 80, 86, 96 S. Ct. 1330, 47 L.Ed.2d 592 (1976) (discussing trial court's broad powers to manage a trial, including rebuttal testimony).

The GAAP definitions for "unusual" and "infrequently occurring" should have alerted the Plaintiffs to the likelihood that the Defendants would argue the nature of KII's business endeavors rendered the expenses at issue usual and frequently occurring. The Accounting Principles Board Opinion No. 30, an opinion at the heart of these accounting claims, refers to the following GAAP definitions for "unusual nature" and "infrequency of occurrence":

> Unusual nature - the underlying event or transaction should possess a high degree of abnormality and be of a type clearly unrelated to, or only incidentally related to, the ordinary and typical activities of the entity, taking into account the environment in which the entity operates.
>
> Infrequency of occurrence - the underlying event or transaction should be of a type that would not reasonably be expected to recur in the foreseeable future, taking into account the environment in which the entity operates.

Reporting the Results of Operation-Reporting the Effects of Disposal of a Segment of a Business, and Extraordinary, Unusual, and Infrequently Occurring Events and Transactions, APB Opinion No. 30 (June 1973) (emphasis added). These definitions explicitly underscore the need to consider

accounting items within "the environment in which the entity operates" when determining whether to classify such items as unusual or infrequently occurring by GAAP standards. Indeed, in opposing the Defendants' motion for summary judgment, the Plaintiffs themselves referenced the language found in APB Opinion No. 30 and pointed out the significance of this language. The Plaintiffs should not have been surprised, therefore, when the defense witnesses discussed the risk-taking business environment in which KII operates and the effect of this environment upon the accounting treatment of expenses.

Furthermore, testimony which the Defendants elicited on cross-examination early in the Plaintiffs' case-in-chief also should have put the Plaintiffs on notice of the Defendants' "risk-taking environment" theory. In cross-examining Milton Hall about his list of "Extraordinary Items," defense counsel took Hall through his list item-by-item, having Hall explain the particular business context in which each of the losses was sustained. Hall thus provided a broad overview of KII's various business enterprises, describing how each of these enterprises both sought to make money and yet routinely suffered losses. One particularly relevant example of this testimony occurred when Hall described KII's practice of trading in futures markets, which resulted both in occasional profits and losses; Hall analogized KII's involvement in the futures market to an individual who trades in the stock market. The effect of this testimony should not have been lost on the Plaintiffs. Even at this early stage of the Plaintiffs' case-in-chief, the Defendants sought to establish the significance of KII's specific and unique business practices to their accounting treatment of particular expenses. Having listened to Hall's testimony, the Plaintiffs reasonably should have anticipated the Defendants' further elaboration on this theory during their

own case. Indeed, the Plaintiffs could easily have countered this testimony prior to closing their case-in-chief.[12]

Finally, it is significant that the Plaintiffs never objected to the testimony elicited by the defense as outside the scope of the defenses articulated in the 1998 Pretrial Order. Had the Plaintiffs raised such an objection, the district court might have limited the controversial testimony and thus obviated the Plaintiffs' asserted need to call a rebuttal witness. Because the Plaintiffs should reasonably have anticipated the evidence they sought to rebut and then failed to object to the evidence as supportive of a new theory beyond the 1998 Pretrial Order, the district court did not abuse its broad discretion in precluding the rebuttal witness.

Regarding the Plaintiffs' contention that this rebuttal witness was necessary to counter defense witness Lynn Markel, who allegedly contradicted the factual testimony of Milton Hall, the record both undermines the Plaintiffs' characterization of Markel's testimony and reveals that Plaintiffs' counsel himself elicited the disputed testimony on cross-examination. Markel initially disagreed with facts and conclusions testified to by a different Plaintiffs' witness, Gary Gibbs, even stating, "I don't know where Mr. Gibbs got his information." The Plaintiffs' attorney then asked, "Did you know that, in fact, Mr. Gibbs had gotten that information from Milton Hall?" Markel replied, "No." The Plaintiffs' attorney then made a final attempt to draw out Markel's disagreement with Hall, eliciting testimony which the Plaintiffs now claim demanded a rebuttal witness: "Q: You told the jury last week that Mr. Gibbs had his facts wrong. And in truth, you disagree with Milton Hall, don't you? A: Mr. Gibbs had his facts wrong, sir." Contrary to the Plaintiffs' assertion in support of their

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[12] Only the seventh of twenty-four witnesses called by the Plaintiffs, Hall testified on April 16, 1998. The trial had begun a mere ten days earlier, and the Plaintiffs did not close their case until one month later on May 18, 1998.

argument for a rebuttal witness, Markel did not dispute Hall's testimony, but rather disagreed with the testimony of Gibbs. Further, even if Markel had disputed Hall's testimony, the Plaintiffs' attorney intentionally elicited such testimony. The record makes clear that Markel was not an out-of-control or unresponsive witness, or one aggressively attempting to advocate on cross-examination. When an attorney conducting cross- examination affirmatively draws out specific testimony, as occurred here, the district court does not abuse its discretion by disallowing rebuttal to that testimony.

C. Evidentiary Rulings

1. Admission of Evidence of Other Lawsuits

Prior to trial, the Plaintiffs moved *in limine* to exclude any evidence of other lawsuits which they filed against the Defendants after filing the instant action in 1985. The court ruled, however, that evidence of these other lawsuits, including that plaintiff William Koch named his own mother as a defendant in one, demonstrated William's ongoing hostility toward his brothers Charles and David. The court further ruled that the evidence of these lawsuits was relevant to William's purported reliance on Charles and David prior to the SPA, as well as to his bias and credibility as a fact witness. The Plaintiffs then moved for reconsideration and modification of this *in limine* ruling. In response, the district court issued another order clarifying that evidence of other lawsuits could not be offered to show William "likes to file lawsuits, that [he] files lawsuits devoid of merit, or that [he] lacked proper feelings and consideration for his mother." In addition, the district court stated that William should have an opportunity to explain his reasons for filing these lawsuits, but that there was no need for either side to introduce evidence, comments, findings, or rulings from these other suits.

During opening statement and over the Plaintiffs' objection, defense counsel noted that William's hostility toward his brothers was the motive behind the instant suit, as evidenced

by his and Frederick Koch's later suit against the Koch Family Charitable Foundation and its trustees, which included "their own mother." Furthermore, while cross-examining William, defense counsel elicited testimony that William had sued his brothers and mother in the Foundation litigation, that he greatly upset his mother by subpoenaing her into court, and that he later brought suit challenging his mother's will. The Plaintiffs objected to this line of questioning as irrelevant and a violation of the court's *in limine* order. As a consequence, the court instructed the Defendants not to delve into the specific facts of these lawsuits. Two days later, the Plaintiffs filed a motion for a mistrial because the Defendants had unfairly elicited testimony about William's suing his mother and injected evidence of the outcome of one post-1985 lawsuit. The district court denied that motion. Two weeks later, however, the district court precluded the introduction of any further evidence that William sued his mother. Finally, before submitting the case to the jury, the district court gave an instruction only to consider evidence of these other lawsuits "on issues of the motives, intent, bias, and credibility of the parties," and not to consider whether any party is overly litigious or to cast judgment on the propriety of the intra-family relationships.

The Plaintiffs now challenge the district court's rulings which allowed introduction of this evidence of post-1985 lawsuits. They argue this evidence lacked relevance or, at best, had *de minimis* probative value which was substantially outweighed by the danger of prejudice resulting from William's admission that he sued his own mother. "[T]he admission or exclusion of evidence lies within the sound discretion of the district court and will not be reversed absent an abuse of discretion." *Seymore* v. *Shawver & Sons Inc.*, 111 F.3d 794, 800 (10th Cir.1997). To determine whether a district court properly admitted evidence of other acts, this court requires:

> (1) the evidence was offered for a proper purpose; (2) the evidence was relevant; (3) the trial court determined under Fed.R.Evid. 403 that the probative value of the evidence was not substantially outweighed by its potential for unfair prejudice; and (4) the trial court gave the jury the proper limiting instructions upon request.

United States v. *Lazcano-Villalobos*, 175 F.3d 838, 846 (10th Cir.1999) (quotation omitted).

The Defendants offered the disputed evidence for proper purposes. The Defendants first claimed that evidence of these lawsuits demonstrated William Koch's bias. *See United States* v. *Abel*, 469 U.S. 45, 51, 105 S. Ct. 465, 83 L.Ed.2d 450 (1984) (holding that the use of evidence of bias to impeach a witness is permissible); *United States* v. *DeSoto*, 950 F.2d 626, 630 (10th Cir.1991). Additionally, the Defendants asserted that this evidence bore directly on an essential element of several of William's claims: whether William relied on the Defendants' misrepresentations.[13] *See United States* v. *Shumway*, 112 F.3d 1413, 1421-22 (10th Cir.1997) ("Prior acts evidence is clearly relevant to show an essential element

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[13] The district court gave the following instruction to the jury:

> I have instructed you, with respect to the plaintiff(s)' claims based on theories of state law fraud, breach of fiduciary duty and Section 10(b), that the plaintiff(s) cannot prevail without proof of actual reliance, that is, they would not have sold their shares at the price actually paid without the defendant(s)' misrepresentations or omissions.... [I]f you find that the plaintiff(s) did not actually rely on any belief that the defendant(s) had completely and truthfully disclosed the material facts but instead actively doubted the defendant(s) and relied on the expectation that they could later sue the defendant(s) for breach of warranty, then your verdict should be for the defendant(s) on the plaintiff(s)' claims asserting theories of state law fraud, breach of fiduciary duty and Section 10(b).

The Plaintiffs never objected to this instruction. As a consequence, reliance was treated as an essential element of these three legal claims.

...." (quotation omitted)). The evidence therefore was offered for permissible purposes.

Evidence of the post-1985 lawsuits, however, did not in fact bear upon these two stated purposes. Thus, the district court should have excluded the evidence as irrelevant. Federal Rule of Evidence 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Fed.R.Evid. 401. Federal Rule of Evidence 402 bars the introduction of any evidence that is not relevant. *See* Fed.R.Evid. 402. This court first fails to understand how evidence that William filed these lawsuits actually demonstrates to any degree that William's testimony may be less credible due to his bias against his brothers, particularly when the Defendants did not, and perhaps could not, show that these lawsuits were frivolous. The Second Circuit rejected the precise argument advanced by the Defendants, concluding that evidence of other suits brought by a plaintiff against the defendants "go[es] to character rather than bias." *Outley* v. *City of New York*, 837 F.2d 587, 594 (2d Cir.1988). Although the *Outley* court recognized the possibility that evidence of other lawsuits could be probative as to bias, "the particular details of each action, and the extent to which the bringing of each action was justified, must be before the jury" to render the evidence relevant and admissible. *Id.* at 595. Here, the district court precluded such an examination of the details and merit of the lawsuits, and thus, the evidence admitted was not relevant to William's alleged bias.

Additionally, the evidence admitted was not relevant to the issue of William's reliance on his brothers' representations in signing the SPA. The evidence concerned lawsuits filed at least two years after the SPA and in part indicated William had sued his mother. Though the filing of these lawsuits might demonstrate William's distrust of his brothers after 1985, the parties entered into the SPA in 1983. This evi-

dence thus lacks probative value as to William's reliance on his brothers in entering into that 1983 agreement. Furthermore, evidence that William sued his mother, even if such a suit had been brought prior to the 1983 SPA, demonstrates nothing about his attitude toward and reliance upon his brothers. Because the contested evidence is irrelevant to the stated purposes for which it was offered, this court concludes that the district court erred in admitting it.

When a trial court erroneously receives evidence, this court will reverse the jury's verdict "only if the error prejudicially affects a substantial right of a party." *Sanjuan* v. *IBP, Inc.*, 160 F.3d 1291, 1296 (10th Cir.1998). This court deems such wrongly admitted evidence prejudicial only if we reasonably conclude that the jury would have reached a different result without that evidence. *See id.* Having reviewed the transcript of this trial, this court cannot reasonably conclude that the jury would have found for the Plaintiffs had it not learned of these other lawsuits. In the context of this eleven week trial, it is extremely doubtful that the lone, brief colloquy between defense counsel and William about suing his brothers and mother and one passing mention of this evidence in the Defendants' opening statement caused the jury to find for the Defendants. Therefore, although the district court did err in admitting the disputed evidence, that error did not sufficiently prejudice the Plaintiffs to warrant reversal of the judgment.

2. The Denial of Cross-Examination on Charles Koch's Character

A number of defense witnesses, including Charles Koch himself, testified to Charles' honesty and integrity, as well as his positive management style. The Plaintiffs repeatedly sought to ask these witnesses whether in rendering their character opinions they knew about or considered certain instances which might call into question Charles' honesty. Specifically, the Plaintiffs wanted to ask about three such instances: (1) a United States Senate Report which detailed

KII's widespread theft and fraudulent reporting practices in the 1980s; (2) a 1974 federal court decision finding KII liable for fraud; and (3) two 1997 retaliatory discharge and age discrimination lawsuits filed against KII.

The district court denied the Plaintiffs the opportunity to ask about these instances, concluding there was "little or no probative value" regarding Charles' honesty, and the danger of confusion, prejudice, and delay substantially outweighed the probative value. The Plaintiffs maintain the district court erred in precluding their cross-examination. This court will not reverse a district court's exclusion of evidence absent an abuse of discretion. *See Seymore*, 111 F.3d at 800.

In *Securities & Exchange Commission* v. *Peters*, this court held that the district court had abused its discretion in refusing to allow the SEC to ask, on cross-examination, both Peters and seven of his character witnesses whether they had heard about other fraud suits filed against him. 978 F.2d 1162, 1164 (10th Cir.1992). The questions which the Plaintiffs in this case sought to ask, however, differ significantly from those at issue in *Peters*. In *Peters*, the SEC sought to test the accuracy of Peters' factual testimony and his witnesses' character testimony by asking if they were aware of two previous fraud suits brought against Peters personally. *See id.* at 1169. In contrast, these Plaintiffs undertook to challenge the character testimony by asking the witnesses if they had heard about instances of dishonesty by KII, the corporation, not by Charles Koch the individual.

Although the Plaintiffs maintain these instances of KII's dishonesty also implicate Charles' own trustworthiness, the nexus between KII's conduct and that of Charles in these instances is not nearly as strong as the Plaintiffs suggest. In its 1974 order finding KII liable for fraud, a federal district court may have noted some of Charles' activities within the company relevant to the fraud action, but it never concluded that he personally committed fraud. The Senate Report focuses almost entirely on the deceptive and illegal practices of KII,

and, although the report does impliedly question the veracity of Charles' statements to committee investigators, it does not explicitly state, as the Plaintiffs assert, that Charles lied. Finally, the retaliatory dismissal and age discrimination complaints name KII as the defendant and allege no wrongdoing whatsoever by Charles Koch; even had these complaints targeted Charles, this court fails to see how allegations of retaliation and age discrimination bear upon the alleged wrongdoer's honesty. This court thus agrees with the district court's conclusion that these instances have no real probative value regarding Charles' character for honesty.

The district court also did not abuse its discretion in determining the little probative value that these instances might have is substantially outweighed by the danger of unfair prejudice, confusion, and waste of time. This court has recognized that exclusion of evidence under Rule 403 is "an extraordinary remedy to be used sparingly" and reviews a district court's decision to do so for abuse of discretion. *K-B Trucking Co.* v. *Riss Int'l Corp.*, 763 F.2d 1148, 1155 (10th Cir.1985) (quotation omitted). For the jury to properly assess the weight of this evidence, the court would have needed to allow both sides to explain how instances reflecting KII's dishonesty as a corporation might or might not implicate Charles' personal character for honesty. The district court, therefore, would have entertained a series of virtual mini-trials on these rather collateral events. Such diversions from the trial's focus would have wasted considerable time and potentially created unnecessary confusion in the minds of the jurors. Because these instances of dishonesty at most only tangentially implicate Charles' own character and the jury could have become confused about the tenuous nature of this link, there existed a definite danger that this minimally probative evidence would unfairly prejudice Charles. Therefore, the district court did not abuse its discretion in excluding these questions under Rule 403.

D. Jury Instructions

For their Pine Bend claims, the Kansas Plaintiffs and the Texas Plaintiffs separately requested jury instructions on fraudulent misrepresentation which defined materiality under a subjective standard. The district court, however, denied these requests and instead gave instructions defining materiality in objective terms.[14] Both the Plaintiffs and the Texas Plaintiffs maintain on appeal that Kansas and Texas law define materiality subjectively. In addition, the Plaintiffs challenge the district court's instruction on fiduciary duty. Finally, the Texas Plaintiffs also appeal the district court's refusal to give instructions or submit a special verdict or a general verdict with interrogatories on their Texas common law constructive fraud and Texas Securities Act claims.

This court reviews jury instructions de novo and reverses only when deficient instructions are prejudicial.[15] *See Coleman* v. *B-G Maintenance Management of Colo., Inc.*, 108 F.3d 1199, 1202 (10th Cir.1997). In assessing the propriety of jury instructions concerning state law claims, this court has a duty to apply state law as announced by the state's highest court. *See Shugart* v. *Central Rural Elec. Co-op.*, 110 F.3d 1501, 1504-05 (10th Cir.1997). If, however, the state's highest court has not decided the issue presented, we may either certify the question to that court or predict how it would rule. *See Fields* v. *Farmers Ins. Co.*, 18 F.3d 831, 834 (10th

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[14] The Plaintiffs' proposed instruction read: "A representation is material when it relates to some matter that is so substantial as to influence the party to [whom] it was made." The Texas Plaintiffs proposed the following: "You are instructed that a fact is material if the plaintiffs would not have entered into the stock transaction without such misrepresentations having been made or facts concealed." The district court, however, settled on this instruction: "A fact is material if a reasonable person would consider the fact important or significant in deciding whether or not to sell his or her shares."

[15] *See infra* 66-68 (discussing the degree of prejudice warranting reversal).

Cir.1994); *Coletti* v. *Cudd Pressure Control*, 165 F.3d 767, 775 (10th Cir.1999); 10th Cir. R. 27.1. Furthermore, "this court must ... follow any intermediate state court decision unless other authority convinces us that the state supreme court would decide otherwise." *Daitom, Inc.* v. *Pennwalt Corp.*, 741 F.2d 1569, 1574 (10th Cir.1984).

1. Kansas Standard of Materiality

To support their contention that the proper definition of materiality under Kansas fraudulent misrepresentation law is a subjective one, the Plaintiffs rely on four Kansas cases and the Kansas Judicial Council's Pattern Instructions ("PIK"). The first two cases to which the Plaintiffs cite do not in fact recite any materiality definition. *See State ex rel. Stephan* v. *GAF Corp.*, 242 Kan. 152, 747 P.2d 1326, 1331 (1987); *DuShane* v. *Union Nat'l Bank*, 223 Kan. 755, 576 P.2d 674, 678 (1978). Although the Plaintiffs' next case, *Fisher* v. *Mr. Harold's Hair Lab, Inc.*, does state a subjective definition of materiality, several paragraphs later the court also articulates an objective standard. *See* 215 Kan. 515, 527 P.2d 1026, 1032 (1974). It is only the Plaintiffs' final case, *McGuire* v. *Gunn*, which clearly defines materiality in subjective terms. *See* 133 Kan. 422, 300 P. 654, 656 (1931). *McGuire*, however, has aged nearly seventy years, and the Kansas Supreme Court long ago ceased relying upon it,[16] instead now applying an objective standard. Finally, PIK Civ.3d 127.40 (1997), which the Plaintiffs maintain directs courts to issue an instruction defining materiality subjectively, speaks to this issue as inconsistently as *Fisher*. Although the proposed instruction states, "A representation is material when it relates to some matter that is so substantial as to influence the party to

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[16] The most recent Kansas appellate court opinion citing *McGuire* for its subjective materiality definition is *Fisher*, a 1974 case which, as noted above, simultaneously stated an objective standard of materiality. *See Fisher* v. *Mr. Harold's Hair Lab, Inc.*, 215 Kan. 515, 527 P.2d 1026, 1032 (1974).

whom it was made," the comments following provide, "Materiality of representation is defined in *Griffith* v. *Byers Constr. Co.* ... and *Timi* v. *Prescott State Bank* ...." As discussed below, both *Griffith* and *Timi* unequivocally define materiality in objective terms.

This court has previously stated that in a fraudulent misrepresentation action pursuant to Kansas law, "A fact is material if it is one to which a reasonable person would attach importance in determining his or her choice of action in the transaction involved."[17] *City of Wichita* v. *U.S. Gypsum Co.*, 72 F.3d 1491, 1495 (10th Cir.1996) (citing *Timi*, 553 P.2d at 325). Following the doctrine of *stare decisis*, one panel of this court must follow a prior panel's interpretation of state law, absent a supervening declaration to the contrary by that state's courts or an intervening change in the state's law. *Cf. Kinnison* v. *Houghton*, 432 F.2d 1274, 1277 (10th Cir.1970) (concluding that the panel need not look to a Tenth Circuit opinion addressing state law which supported the appellant's position, because an intervening state court decision held to the contrary). Because the Plaintiffs have failed to alert us to any supervening Kansas decisions contrary to *U.S. Gypsum*'s reading of the materiality element in a Kansas fraud action, and we have located no such authority, this court is bound by *U.S. Gypsum*'s conclusion that Kansas law defines materiality under an objective standard in a state fraud action.

Moreover, negotiating the labyrinth of Kansas jurisprudence confirms that the standard of materiality for fraudulent misrepresentation, as presently defined by the Kansas Su-

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[17] The Plaintiffs contend this court, in another case, also applied a subjective definition of materiality under Kansas law. *Palmer Coal & Rock Co.* v. *Gulf Oil Co.*, however, simply quotes a district court's instructions which articulated the subjective standard, but does not itself endorse such an approach as the correct one. *See* 524 F.2d 884, 885 n. 1 (10th Cir.1975). The *Palmer Coal* court noted neither side objected to these instructions, thus verifying that it did not adopt the subjective standard in the instructions. *See id.* at 885.

preme Court, is an objective one. In *Griffith*, a case involving an action for fraudulent concealment, the Kansas Supreme Court first indicated that such an action is governed by the identical legal standard as a fraudulent misrepresentation claim. *See* 212 Kan. 65, 510 P.2d 198, 205 (1973). In defining materiality for such an action, the Kansas Supreme Court stated, "A fact is material if it is one to which a reasonable [person] would attach importance." *Id.*; *see also Timi*, 220 Kan. 377, 553 P.2d 315, 317, 325 (1976) (defining materiality in the same terms in a fraudulent misrepresentation case). Indeed, in its recent review of a consumer protection action alleging illegal misrepresentation, the Kansas Supreme Court relied on *Griffith*'s objective definition of materiality. *See York* v. *InTrust Bank, N.A.*, 265 Kan. 271, 962 P.2d 405, 420 (1998); *see also Farrell* v. *General Motors Corp.*, 249 Kan. 231, 815 P.2d 538, 548 (1991). Furthermore, in discussing the elements of fraud by silence, the Kansas Supreme Court recently noted that a duty to disclose material facts only arises when the other party would reasonably expect disclosure. *See OMI Holdings Inc.* v. *Howell*, 260 Kan. 305, 918 P.2d 1274, 1300-01 (1996). This court's review of Kansas law and binding Tenth Circuit precedent thus leads to the conclusion that the district court properly instructed the jury on materiality under Kansas law.

2. Texas Standard of Materiality

In contrast, the Texas Plaintiffs correctly characterize as subjective the definition of materiality under their two distinct claims, i.e., Texas common law fraud and a violation of section 27.01 of the Texas Business & Commercial Code ("section 27.01").[18] Although the Texas Supreme Court has not

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[18] Although the Defendants contend that the district court erred in its choice of law decision allowing the Texas Plaintiffs to proceed on two Texas state law claims, the Defendants nonetheless expressly waived review of that determination on appeal because they believe Kansas and Texas law do not differ on the issue.

recently articulated a materiality definition for either of these two causes of action, numerous Texas Court of Appeals and Fifth Circuit opinions lead this court to agree with the position taken by the Texas Plaintiffs. Discussing Texas common law fraud, the Texas Court of Appeals recently stated, "A misrepresentation is material if it induced the complaining party to enter into the contract." *Marburger* v. *Seminole Pipeline Co.*, 957 S.W.2d 82, 86 n. 4 (Tex.App.1997, writ denied). *Marburger* simply follows a long line of cases establishing this subjective standard. *See, e.g., Hart* v. *Aetna Cas. & Sur. Co.*, 756 S.W.2d 27, 29 (Tex.App.1988, no writ); *Sawyer* v. *Pierce*, 580 S.W.2d 117, 124 (Tex.App.1979, writ ref'd n.r.e.); *Putnam* v. *Bromwell*, 73 Tex. 465, 11 S.W. 491, 492 (1889). Additionally, the Fifth Circuit has noted that Texas common law fraud, unlike federal securities fraud, defines materiality in subjective terms. *See In re Sioux Ltd., Securities Litigation* v. *Coopers & Lybrand*, 914 F.2d 61, 65-66 (5th Cir.1990), *implied overruling on other grounds recognized by, Pacific Mut. Ins. Co.* v. *First RepublicBank Corp.*, 997 F.2d 39, 41 (5th Cir.1993). Indeed, a treatise on Texas law states the following:

> In order to constitute actionable fraud, representations must pertain to material facts....
>
> The test for determining whether a represented fact is material relates to the effect of the representation on the transaction in question....
>
> A representation is not material if it appears that the transaction would have been entered into notwithstanding the representation. On the other hand, a represented fact is said to be material if the transaction would not have been entered into had the representation not been made.

Elizabeth A. Wong, 41 Texas Jurisprudence, Fraud and Deceit § 13 (3d ed.1998).

Admittedly, a few Texas cases have caused some confusion about the proper materiality standard under Texas common law fraud. Two recent Texas Court of Appeals cases each confusingly recite both an objective and a subjective materiality standard in a single sentence. *See Beneficial Personnel Servs. of Texas, Inc.* v. *Porras*, 927 S.W.2d 177, 186-87 (Tex.App.1996, writ granted w.r.m.); *Beneficial Personnel Servs. of Texas, Inc.* v. *Rey*, 927 S.W.2d 157, 168 (Tex.App.1996, writ granted w.r.m.). The objective language in these two cases is drawn from another case upon which the Defendants rely, which merely quoted a trial court's instructions employing an objective standard but never affirmatively approved those instructions. *See American Medical Int'l, Inc.* v. *Giurintano*, 821 S.W.2d 331, 338 (Tex.App.1991, no writ). No other case to which the Defendants cite suggests Texas common law fraud utilizes an objective definition of materiality.[19] *Porras* and *Rey* merely confuse the issue; they do not overrule earlier cases and they antedate *Marburger*. Therefore, this court is convinced that Texas common law fraud jurisprudence establishes a subjective standard of materiality.

Materiality under section 27.01 is also measured subjectively. As the Fifth Circuit noted, "Because the statute is derived from Texas common law fraud, the reliance and materiality elements of section 27.01 do not differ from those of

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[19] Like American Medical, Miller v. Miller merely notes a trial court's use of an objective definition in jury instructions without deciding the correctness of those instructions. *See* 700 S.W.2d 941, 948 (Tex.App.1985, writ ref'd n.r.e.). *Bridwell* v. *State* addresses criminal fraud under the Texas Securities Act, not state common law fraud. *See* 804 S.W.2d 900, 904 (Tex.Crim.App.1991, no pet.). *Shepard* v. *Rubin* never articulates a materiality definition, though it implicitly approves a subjective standard laid down in *H.W. Broaddus Co., Inc.* v. *Binkley*, an opinion adopted by the Texas Supreme Court. *See Shepard*, 462 S.W.2d 316, 320 (Tex.App.1970, no writ); Binkley, 126 Tex. 374, 88 S.W.2d 1040, 1042 (1936). Finally, *American Tobacco Co.* v. *Grinnell* addresses the element of reliance, not materiality. *See* 951 S.W.2d 420, 436 (Tex.1997).

Texas common law fraud." *Haralson* v. *E.F. Hutton Group, Inc.*, 919 F.2d 1014, 1025 n. 4 (5th Cir.1990); *see also Fisher* v. *Yates*, 953 S.W.2d 370, 380 n. 7 (Tex.App.1997, writ denied) ("The reliance and materiality elements of statutory fraud [under section 27.01] do not differ from common law fraud."); Keith A. Rowley, The Sky is Still Blue in Texas: State Law Alternatives to Federal Securities Remedies, 50 Baylor L.Rev. 99, 124 n. 104, 163 n. 198 (1998) (noting that in contrast to an action under Texas Securities Act, an action pursuant to common law fraud or section 27.01 merely requires a subjective showing of materiality). The Defendants have failed to alert this court to any authority that treats section 27.01's materiality element as an objective one, and nor have we found any such authority. This court thus concludes that section 27.01 imposes a subjective standard of materiality.

Finally, the district court's incorrect jury instruction sufficiently prejudiced the Texas Plaintiffs to warrant reversal. This court recently noted its own conflicting precedent regarding the precise standard for reversal due to erroneous instructions. *See Morrison Knudsen Corp.* v. *Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1236-37 (10th Cir.1999). *Coleman* and *U.S. Gypsum* require reversal when a jury might have based its decision on an erroneous instruction, even if that possibility was very unlikely. *See Coleman*, 108 F.3d at 1202; *U.S. Gypsum*, 72 F.3d at 1495. An earlier case, however, indicated this court should only reverse when it is more likely than not that the erroneous instruction affected a substantial right of the appellant. *See United States Indus., Inc.* v. *Touche Ross & Co.*, 854 F.2d 1223, 1253 n. 39 (10th Cir.1988), *implied overruling on other grounds recognized by*, *Anixter* v. *Home-Stake Production Co.*, 77 F.3d 1215, 1231 (10th Cir.1996). *Morrison Knudsen* did not need to reconcile these differing standards. *See* 175 F.3d at 1237.

Again, we need not decide which of these competing standards controls, because the erroneous instruction here

would require reversal under either approach. The district court's erroneous instruction on an essential element of the Texas Plaintiffs' fraud claims effectively directed the jury to ignore the Texas Plaintiffs' own testimony that they would not have entered into the SPA absent the Defendants' misrepresentations and omissions. Additionally, the Defendants failed to present any evidence contradicting the Texas Plaintiffs' testimony about their states of mind.[20] Even under the more burdensome *Touche Ross* standard, therefore, the erroneous instruction warrants reversal, because the error more than likely, if not necessarily, affected a substantial right of the Texas Plaintiffs, *i.e.*, the right to have the jury even consider the primary and only direct evidence on the materiality element. The district court therefore committed reversible error with respect to the Texas Plaintiffs' claims when it instructed the jury to determine objectively whether the Defendants' misrepresentations and omissions were material.

3. Fiduciary Duty

Relying upon a 1986 order by the district court, the Plaintiffs proposed a jury instruction which stated, "The Court has found, as a matter of law, that a fiduciary relationship existed between the plaintiffs and the defendants." Over the Plaintiffs' objection, the district court instead instructed the jury as follows:

> To recover on their [fiduciary duty] claim, the plaintiff(s) have the burden of first proving, by a preponderance of evidence that is clear and convincing, that they

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[20] The Defendants did present evidence indicating that a reasonable person would not have been affected by the alleged misrepresentations in deciding whether to enter into the SPA. Certainly such reasonable person evidence may be used to counter the Texas Plaintiffs' testimony because a jury could potentially discredit the Texas Plaintiffs testimony based on the unreasonableness of their assertions. Nonetheless, the Defendants presented no direct evidence that the Texas Plaintiffs ever said or believed anything contradicting their state-of-mind testimony.

did not voluntarily and intentionally relieve the individual defendant(s) of their fiduciary duty as directors or officers of Koch Industries. If you find the plaintiff(s) to have not met this burden of proof, then you shall find that the individual defendant(s) did not owe a fiduciary duty.

If you find, however, the plaintiff(s) have proved that they did not relieve the defendant(s) of their fiduciary duty as directors or officers of Koch Industries, then it becomes the individual defendant(s)' burden to prove, by a preponderance of evidence that is clear and convincing, the following elements:

(1) that concerning the alleged misrepresentations or omissions, the individual defendant(s) completely and truthfully disclosed to the plaintiff(s) or their agent(s) all relevant facts, known to the individual defendant(s) by reason of their office or position at Koch Industries and not known by the plaintiff(s) or their agent(s), that were material in affecting the value or price of the stock; and

(2) that the plaintiff(s) were paid a fair price for their stock and that the terms of the transaction were fair, balanced against the best interests of the corporation and all of its shareholders.

In short, the first paragraph of this instruction required the jury to determine whether a fiduciary relationship actually existed; if the jury answered this predicate inquiry in the affirmative, it then needed to determine whether the Defendants in fact breached their fiduciary duty.

The verdict form, however, guided the jury directly to the second question, entirely ignoring the predicate inquiry of whether a fiduciary relationship existed. Question 6 on the verdict form stated, "Do you find on the fiduciary duty claim that the defendants have proved that they disclosed those material facts concerning Pine Bend Refinery to the plaintiffs

which the plaintiffs or their agents otherwise did not know and that Koch Industries paid a fair price for the plaintiffs' stock?" The jury answered, "Yes."

The Plaintiffs appeal the district court's instruction requiring them to prove the existence of a fiduciary relationship, arguing that Kansas law imposes a strict fiduciary duty on corporate officers and recognizes no exception to this duty when a plaintiff may have relieved an officer defendant of that duty. As noted above, this court will reverse a district court judgment only when deficient instructions are prejudicial. *See Coleman*, 108 F.3d at 1202. Here, this court need not determine whether the challenged instruction constituted a proper statement of the law, because the verdict form rendered any possible error in the instruction harmless. Although the jury was told in the instructions that they would need to first determine whether the Defendants had been relieved of their fiduciary duty, the verdict form never asked that question. Instead, Question 6 in the verdict form impliedly assumed that a fiduciary relationship existed and queried only whether the Defendants had proved they did not breach that relationship, to which the jury answered "yes." Because the verdict form never posed the challenged question to the jury but impliedly assumed the answer in favor of the Plaintiffs and the jury found for the Defendants on the breach inquiry, this court concludes any possible error in the district court's instructions on the existence of a fiduciary relationship was harmless. Due to this harmlessness, this court need not reverse the judgment under either the *Coleman/U.S. Gypsum* prejudice standard or that of *Touche Ross*, even if the challenged instruction was erroneous. *See Coleman*, 108 F.3d at 1202 (requiring reversal when a jury might have based its decision on an erroneous instruction); *U.S. Gypsum*, 72 F.3d at 1495 (following *Coleman* standard even if the possibility is very unlikely); *Touche Ross*, 854 F.2d at 1253 n. 39 (requiring reversal only when it is more likely than not that an erroneous instruction was prejudicial).

4. The Texas Common Law Constructive Fraud Claims

Prior to submitting the case to the jury, the Texas Plaintiffs proposed instructions, definitions, and verdict questions on their Texas common law constructive fraud claims. Over their objection, however, the district court refused to submit instructions or verdict questions to the jury relating to Texas constructive fraud. The court reasoned that those claims duplicated others and, alternatively, that the Texas Plaintiffs had failed to include a constructive fraud claim in the 1998 Pretrial Order.

In appealing the district court's decision, the Texas Plaintiffs maintain Rule 15(b) required the district court to amend the pleadings to include a constructive fraud claim. Their opening brief, however, does not offer any argument whatsoever that the 1998 Pretrial Order did in fact include a constructive fraud claim. The issue of the court's construction of the 1998 Pretrial Order is thus waived on appeal.[21] *See Johnson ex rel. Johnson* v. *Thompson*, 971 F.2d 1487, 1499 (10th Cir.1992) (noting this court generally will not address issues that the parties failed to brief). Therefore, this court must only determine whether the district court properly declined to amend the Pretrial Order. We review that determination for an abuse of discretion. *See Trierweiler*, 90 F.3d at 1543.

Upon a party's motion, a trial court should amend the pretrial order to include issues not initially raised in that order but tried by express or implied consent of the parties. *See* Fed.R.Civ.P. 15(b). A trial court should find such implied consent either when the consenting party introduces evidence on the new issue or fails to object when the other party intro-

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[21] In the Texas Plaintiffs' Reply Brief, they argue "the phrase 'common law fraud' used in the complaint and pretrial order includes constructive fraud under Texas law." They never raised this argument, however, in their opening brief, and this court need not entertain an argument raised for the first time in a reply brief. See, e.g., Coleman v. B-G Maintenance Management of Colo., Inc., 108 F.3d 1199, 1205 (10th Cir.1997).

duces such evidence. *See Hardin*, 691 F.2d at 457. This court, however, has determined that "[w]hen the evidence claimed to show that an issue was tried by consent is relevant to an issue already in the case, and there is no indication that the party presenting the evidence intended thereby to raise a new issue, amendment may be denied in the discretion of the trial court." *Id.* The Texas Plaintiffs fully concede that the evidence presented at trial to support a constructive fraud claim precisely matched that evidence relevant to several of their other claims. Therefore, the Defendants did not impliedly consent to the trial of constructive fraud, and the district court acted well within its discretion in declining to amend the 1998 Pretrial Order to include an admittedly duplicative claim.

5. Texas Securities Act Claims

Similarly, the district court refused to submit to the jury the Texas Plaintiffs' Texas Securities Act claims. The district court determined the Act required proof that the stock at issue no longer exists and no such evidence had been presented to support that requirement. On appeal, the Texas Plaintiffs argue the district court improperly construed the statute. They acknowledge, however, that their appeal on this issue depends upon this court's concluding the materiality element of fraud under the Texas Securities Act is a subjective one.

Unlike actions under Texas common law fraud or section 27.01,[22] however, a fraud claim pursuant to the Texas Securities Act does require proof of objective materiality. Most recently, the Texas Court of Appeals stated that under the Texas Securities Act "an omission or misrepresentation is material if there is a substantial likelihood that a reasonable investor would consider it important in deciding to invest." *Weatherly* v. *Deloitte & Touche*, 905 S.W.2d 642, 648-49 (Tex.App.1995, writ dism'd w.o.j.) (emphasis added); *see*

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[22] *See supra* Section III.D.2.

also Anheuser-Busch Co. v. *Summit Coffee Co.*, 858 S.W.2d 928, 936 (Tex.App.1993, writ denied) (same), *vacated on other grounds* 514 U.S. 1001, 115 S. Ct. 1309, 131 L. Ed.2d 192 (1995); *Granader* v. *McBee*, 23 F.3d 120, 123 (5th Cir.1994) (same). Indeed, one commentator explicitly noted that materiality is defined objectively under the Texas Securities Act, but subjectively under Texas common law fraud and section 23.01. *See* Keith A. Rowley, The Sky is Still Blue in Texas: State Law Alternatives to Federal Securities Remedies, 50 Baylor L.Rev. 99, 121 n. 104, 163 n. 198 (1998). The Texas Plaintiffs have cited no authority suggesting a subjective materiality standard under the Texas Securities Act, and this court has found none. Therefore, because materiality is defined objectively under the Texas Securities Act and the jury found the Defendants' omissions and misrepresentations were not objectively material, the district court's refusal to submit Texas Securities Act claims to the jury, if error, was harmless.

E. District Court's Limitations on Plaintiffs' Fraud Claims

1. The Rule 9(b) Order

The Plaintiffs' Fifth Claim for Relief in their Amended Complaint pleaded fraud by the Defendants. Specifically, the fraud claim alleged that the Defendants misrepresented and concealed information about three particular KII assets – Koch Qatar, Inc., the Capa Madison Unit, and the Bates & Reimann wells. In addition, the fraud claim incorporated an allegation contained in paragraph twenty-two of the Amended Complaint, which broadly stated,

> during 1982 and continuing to the present time, defendants planned and acted to conceal the true value of shares of stock in Koch Industries from plaintiffs and the other selling shareholders and carried out a scheme designed to understate the existence, extent and value of property and assets owned directly or beneficially by Koch Industries by failing to disclose the existence, lo-

> cation, ownership, condition and true value of assets and property, including, but not limited to, oil and gas reserves, acreage, prospects and properties, oil and gas production and planned development of oil and gas properties owned or acquired prior to June 10, 1983.

In an October 17, 1985 order, the district court limited the Plaintiffs' fraud claims to those allegations concerning the three specifically referenced assets, determining that the broad allegation contained in paragraph twenty-two did not satisfy the particularity pleading requirement of Federal Rule of Civil Procedure 9(b). The district court went on to grant the Defendants summary judgment on the causes of action regarding two of the three assets-Koch Qatar, Inc. and the Bates & Reimann wells. The Plaintiffs now challenge the district court's Rule 9(b) ruling restricting the Plaintiffs' fraud claims.[23]

This court reviews a district court's Rule 9(b) ruling de novo and confines its analysis to the text of the complaint. *See Schwartz* v. *Celestial Seasonings, Inc.*, 124 F.3d 1246, 1251 (10th Cir.1997). Rule 9(b) provides, "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally." Fed.R.Civ.P. 9(b). More specifically, this court requires a complaint alleging fraud to "set forth the

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[23] In addition to the district court's October 17, 1985 ruling, the Plaintiffs challenge two later orders of the district court, issued on October 24, 1991 and June 30, 1992, which they also claim constituted dismissals of allegations under Rules 9(b) and 8. Although the October 24 order did reference Rule 9(b), it concerned discovery requests by the Plaintiffs, not dismissals of allegations or claims. Thus, this court will discuss the propriety of that order in the following section of this opinion dealing with discovery. *See infra* Section III.E.2. The June 30 order addressed the Plaintiffs' motion to amend their Second Amended Complaint, and the district court did not rely at all on Rule 9(b) or Rule 8 in denying some of the proposed amendments.

time, place and contents of the false representation, the identity of the party making the false statements and the consequences thereof." *Lawrence Nat'l Bank* v. *Edmonds* (*In re Edmonds*), 924 F.2d 176, 180 (10th Cir.1991). Rule 9(b)'s purpose is "to afford defendant fair notice of plaintiff's claims and the factual ground upon which [they] are based...." *Farlow* v. *Peat, Marwick, Mitchell & Co.*, 956 F.2d 982, 987 (10th Cir.1992) (quotation omitted), *implied overruling on other grounds recognized by*, *Seolas* v. *Bilzerian*, 951 F.Supp. 978, 981-82 (D.Utah 1997).

Here, the broad allegation in paragraph twenty-two of the Plaintiffs' Amended Complaint, which the district court found insufficient under Rule 9(b), set forth none of the specific and required allegations. The statement that the alleged misrepresentations were made "during 1982 and continuing to the present time" does not alert the Defendants to a sufficiently precise time frame to satisfy Rule 9(b). Furthermore, paragraph twenty-two fails to mention at all the place at which any misrepresentations were made. In addition, this paragraph specifies nothing about the content of the alleged misrepresentations, instead reciting a general statement that the Defendants "fail[ed] to disclose the existence, location, ownership, condition and true value of [KII] assets and property." Finally, paragraph twenty-two failed to identify any specific Defendant who made these alleged fraudulent misrepresentations or omissions, a particularly important requirement in this case because of the number of individual defendants involved.

The Plaintiffs cite *Scheidt* v. *Klein*, 956 F.2d 963 (10th Cir.1992) for the proposition that Rule 9(b) particularity requirements are relaxed when the facts supporting a fraud claim are within the opponent's knowledge and control. Scheidt, however, is not so generous. It merely holds that "[a]llegations of fraud may be based on information and belief when the facts in question are peculiarly within the opposing party's knowledge and the complaint sets forth the factual basis for the plaintiff's belief." *Id.* at 967. Unlike the

complaint in *Scheidt*, paragraph twenty-two did not state that the Plaintiffs' allegations of fraud were based on information and belief, nor did it set forth any factual basis to support such a belief. Instead, paragraph twenty-two broadly alleged that the Defendants concealed the true value of KII stock without informing the court or the Defendants of the source for this contention. Moreover, the information and belief allegations in *Scheidt* concerned the intent or purpose of the defendants' actions, elements which this court noted were allowed to be pleaded generally under Rule 9(b). See id. Paragraph twenty-two, however, does not address intent or purpose, and thus Rule 9(b) does not excuse the generality of the Plaintiffs' allegations. Therefore, the district court properly precluded the Plaintiffs from pursuing fraud claims based on the broadly stated allegations of paragraph twenty-two.

2. The Discovery Rulings

After substantial but unsuccessful efforts by the Plaintiffs to litigate the claims stricken by the Rule 9(b) decision, the district court granted them leave to file a Second Amended Complaint and determined that document to be the one measuring the relevance of discovery requests. The Plaintiffs then issued subpoenas for production of documents from six different banks requesting all documents relating to any loans or transactions with KII between June 1, 1978 and June 30, 1988. In two separate orders, a federal magistrate judge limited this discovery request to those documents relating only to "the Pine Bend Refinery, the Pouce Coupe, Gilt Edge and Cold Lake properties in Canada, the equity value of ABKO, and the alleged understated value of certain assets because of financial and accounting policies and practices." The Plaintiffs also subpoenaed from the Ryder Scott Company all records of KII's oil and gas reserves for the years 1980 through 1988. A federal magistrate judge also limited this discovery to those documents concerning four KII assets – the Pouce Coupe, Gilt Edge, Cold Lake and Capa Madison properties.

The district court then affirmed the magistrate's decisions in its own order of October 24, 1991. In so ruling, the district court first determined that paragraphs thirty-eight and forty-six of the Plaintiffs' Second Amended Complaint did not delineate allegations of financial impropriety with sufficient particularity under Rule 9(b) "to justify discovery into all accounting documents and practices of Koch Industries during the relevant time period." Additionally, the district court reasoned that even under the Plaintiffs' breach of contract and breach of fiduciary duty claims, Rule 26 barred the requested discovery because the burden and expense of producing these documents far outweighed the Plaintiffs' mere hope that they might find something upon which to base a claim. The Plaintiffs challenge the district court's orders limiting their discovery attempts.

This court reviews discovery rulings for an abuse of discretion. *See Pippinger* v. *Rubin*, 129 F.3d 519, 533 (10th Cir.1997). Rule 26(b) provides, "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.... The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Fed.R.Civ.P. 26(b)(1). Despite this broad language, the rule does allow a court to limit discovery if "the burden or expense of the proposed discovery outweighs its likely benefit." Fed.R.Civ.P. 26(b)(2)(iii). Indeed, the 1983 and 1993 Advisory Committee Notes indicate this sub-section was added "to encourage judges to be more aggressive in identifying and discouraging discovery overuse" and "to enable the court to keep tighter rein on the extent of discovery."

The Plaintiffs attempted to justify their extraordinarily expansive discovery requests as relevant to two broad, non-specific allegations contained in their Second Amended

Complaint.[24] When a plaintiff first pleads its allegations in entirely indefinite terms, without in fact knowing of any specific wrongdoing by the defendant, and then bases massive discovery requests upon those nebulous allegations, in the hope of finding particular evidence of wrongdoing, that plaintiff abuses the judicial process. That is what occurred here. The limits which Rule 26(b)(2)(iii) place upon discovery are aimed at just such a tactic. Utilizing its discretionary power under this rule, the district court appropriately recognized that the likely benefit of this attempted fishing expedition was speculative at best. Furthermore, the district court understood that to require the six banks and the Ryder Scott Company to produce the massive amount of documents requested, first weeding out privileged and confidential records, would impose a serious burden and expense upon these non-parties. The district court thus properly determined that the burden and expense of these discovery requests far outweighed their likely benefit. Therefore, this court concludes the district court did not abuse its discretion in limiting the Plaintiffs' discovery.

F. The District Court's Administration of this Case

The Plaintiffs contend the district court administered this case unjustly. They first assert the district court harbored an unfair disdain for the Plaintiffs which led the court to oversee the case in a biased fashion. The Plaintiffs then list a number of the district court's rulings which were unfavorable to them as evidence of the court's "harsh, lopsided and manifestly unjust" treatment.

To the extent that some of the specified rulings were contested in greater depth in previous sections of the Plaintiffs' brief, this court has already disposed of those arguments.

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[24] Both paragraphs thirty-eight and forty-six contained broad allegations that the Defendants did not provide financial information to the Plaintiffs in accord with GAAP. Paragraph forty-six recited one specific example of these alleged accounting improprieties relating to the Pine Bend Refinery.

Furthermore, the Plaintiffs cite no legal authority at all in contesting other rulings which they failed to address in prior portions of their brief, thus waiving these arguments on appeal. *See Adler*, 144 F.3d at 679 (noting that "[a]rguments inadequately briefed in the opening brief are waived"). Finally, at no point during the litigation did the Plaintiffs seek to have the district court judge disqualified on the basis of bias or on any other grounds. The Plaintiffs thus waive their bias argument on appeal because they failed to timely move for disqualification. *See United States* v. *Stenzel*, 49 F.3d 658, 661 (10th Cir.1995). Therefore, this court concludes none of these arguments warrants reversal.

G. Damages

Finally, the Plaintiffs assert the district court erroneously limited their damages, arguing that their Section 10(b) and Rule 10b-5 claims warranted a more liberal measure of damages than allowed by the court. Because the jury found for the Defendants and, with the exception of the Texas Plaintiffs' state common law and statutory misrepresentation claims, this court now affirms each of the district court's rulings which the Plaintiffs challenge, we need not address this issue.

H. Motion to Correct Misstatements at Oral Argument

The Plaintiffs have filed a motion under Federal Rule of Appellate Procedure 27 to correct alleged misstatements by defense counsel at oral argument. Rather than a Rule 27 motion, the Plaintiffs' filing constitutes an additional six pages of briefing on the merits, which in turn inspired a response from the Defendants amounting to twelve more pages of such briefing. Not to be outdone or, in the alternative, to equalize the pages of briefing on the merits under the guise of the Rule 27 motion, the Plaintiffs then filed a six page reply.

One thing this court did not need in this case was further briefing and argument. The court previously demonstrated leniency in allowing the filing of oversized briefs pursuant to

Federal Rule of Appellate Procedure 28(g) and Tenth Circuit Rule 28.3 and by granting additional time for oral argument. Regarding the Plaintiffs' substantive claims in this motion, while it is true that one of the statements challenged is a misstatement, defense counsel did not make the utterance maliciously nor did he mislead the court. Most disturbingly, the Plaintiffs' motion reveals their apparent assumption that the court does not read the record to confirm or refute representations as to its content. That assumption is wrong.

The Plaintiffs' motion is denied as an inappropriate attempt to circumvent Federal Rule of Appellate Procedure 28(c), which states,"Unless the court permits, no further briefs [beyond the reply brief] may be filed." Fed. R.App. P. 28(c).

IV. CONCLUSION

In deciding the instant appeal, this court has reviewed a piece of litigation spanning a decade and a half and a trial lasting nearly three months. This court is well aware that in such litigation the discretion of the trial court is important to accomplish efficiency, notice, and fairness. In this context, however, we could not reasonably expect perfection in the district court's exercise of that discretion or in its overall handling of the case; rather, what this court expects from the district court is basic fairness to all parties. Having reversed the district court on but two of many issues presented on appeal, we are satisfied that the district court achieved fundamental fairness in its presentation of this vast and complex piece of litigation to lay fact finders.

This court hereby AFFIRMS the judgment of the United States District Court for the District of Kansas, except as to the Texas Plaintiffs' claims under state common law fraud and section 27.01 of the Texas Business & Commercial Code. Regarding those two claims, this court REVERSES and REMANDS for proceedings consistent with this opinion.

APPENDIX

Following is a list and discussion of the evidence which this court considered in determining whether the district court erroneously granted summary judgment on the Plaintiffs' 175,000 B/D expansion claim:

- A 12/13/82 letter from Keith Bailey, President of Williams Pipeline, to J.W. Moeller, Vice President of KII, stating, "As you know, time is growing short if we are to have an expansion in place by mid-1983." This letter undoubtedly refers to the 145,000 B/D expansion, not the 175,000 B/D expansion idea, as even Plaintiffs allege the larger expansion was not intended for completion until the end of 1985 while KII aimed to complete the 145,000 B/D expansion by mid-1983.

- A 1/6/83 letter from KII's Vice President of Planning to Williams Pipeline, stating, "Due to Koch Refining's current and planned future expansion of our Pine Bend Refinery ... Koch Refining and Williams Pipeline management have been discussing several plans to increase current pumping capacity into the Williams system." Given the date of this letter, the "current expansion" language must refer to the 145,000 B/D expansion. The "planned expansion" wording, however, is not expressly clear as to whether it refers to a 155,000 B/D or a 175,000 B/D expansion. Reading this document in the context of the other evidence, however, leads this court to conclude this language must refer to the lesser expansion, inasmuch as there is no evidence that as of January 6, 1983 KII had even started discussions with Litwin Engineering about a potential 175,000 B/D expansion.

- 1/20/83 Litwin Engineering notes from a meeting with KII representatives, stating,

> 1. The purpose of the meeting was to establish a basis for design to expand Koch's St. Paul Refinery No. 1 Crude Unit to 65,000 BPD. The unit presently operates

at approximately 39,000--40,000 BPD. Koch is currently making modifications which will increase capacity to approximately 50,000 BPD.

2. Target for processing 65,000 BPD would be start of summer, 1984.

These notes indicate that prior to the SPA, KII had inquired of Litwin about possible designs for Unit 1 which would enable that unit to process 65,000 B/D. KII was therefore at least considering such an expansion prior to the SPA. These notes do not suggest, however, that KII had contracted with Litwin to do actual design work required for the expansion or that KII had committed in any way to effectuating the expansion.

- an undated Litwin Proposal, stating the following:

Litwin will provide engineering and estimating services to provide Koch Refining Co. with comparative budget cost estimates of 1) expanding Koch's existing St. Paul Refinery No. 1 Crude Unit from the present operating capacity of 40,000 BPSD to 65,000 BPSD and

2) constructing a new 65,000 BPSD Crude Unit at the same facility.

Litwin's initial emphasis will be the review of two cases of a 1979 study for expanding Koch's St. Paul No. 1 Crude Unit.

. . . .

Litwin anticipates completion of this work approximately five weeks after release by Koch.

This likely was written shortly after the January 1983 meeting with KII representatives. The Proposal, however, manifests only the internal dynamics of Litwin regarding what it would do to study the potential expansion.

- a 2/1/83 Proposal from Litwin to KII:

> Litwin proposes to provide process and mechanical engineering and cost estimating services to compare [1.] expansion of the No. 1 Crude Unit from 40,000 BPSD to 60,000 BPSD, [2.] expansion of the No. 1 Crude Unit from 40,000 BPSD to 65,000 BPSD, and [3.] construction of a new 65,000 BPSD Crude Unit.
>
> . . .
>
> Litwin will review and update ... two cases of its 1979 study for expansion of the No. 1 Crude Unit....
>
> This proposal is valid for acceptance on or before February 15, 1983....

This document appears to be a contract offer from Litwin to KII. Like the prior undated proposal, this document reveals Litwin's offer to engage in these studies but not KII's commitment to the studies or the actual expansion.

• 1/31/83; 2/3/83; 2/14/83 calculations by Litwin employees. These calculations were performed internally by Litwin and there is no direct evidence that they ever reached the eyes of KII representatives. This work, however, may imply that KII had in fact accepted Litwin's proposal to study these design options for the 175,000 B/D expansion. Alternatively, these calculations may merely suggest Litwin's dogged and hopeful pursuit of a contract which KII had not yet accepted. At most, however, this work merely evidences that KII was studying the expansion option, but not that KII had committed to it.

• 3/4/83 Project Notes for internal use only, written by L.J. Ross of Litwin, stating, "Attached is a marked-up Equipment Summary for both the 60,000 BPSD and 65,000 BPSD Crude Unit Expansion...." Again, while one might infer from these notes that KII had engaged Litwin to study these two options, there remains no evidence KII saw these notes or that the matter progressed to a planned expansion.

• an 8/3/83 unsigned memorandum entitled "Crude and Hydrotreater Expansion-- Pine Bend," which states, "We propose to utilize an existing FCC Preheater and add a Preflash Tower to increase our No. 1 Crude Unit capacity to 65,000 B/D. This plus 110,000 B/D capacity of the No. [2] crude unit ... will give us a total of 175,000 B/D crude capacity." The words "our No. 1 Crude Unit" indicate a KII employee drafted this memorandum. The document, however, merely proposes this expansion option. It does not demonstrate that KII was actually planning to execute this expansion.

• 8/9/83 Litwin Conference Notes from a meeting with J. Johnson of KII, stating, "Litwin is to present Koch with the cost and time required to prepare a process package with major equipment specifications for a new 65,000 BPD Unit and Splitter Tower at the St. Paul Refinery." These notes provide fairly strong inferential evidence that KII had not accepted Litwin's earlier contract offer of February 1, 1983. If KII had accepted that offer, these cost estimates would have been prepared much earlier.

• 8/19-20/83, KII Board of Directors Meeting Supplemental Information, stating "Analysis of the expansion of Pine Bend crude and desulfurization capacity have been underway for some time.... Design and optimization of equipment of the two desulfurizers and the crude expansion are in progress.... [A]pplication for the crude expansion permit will be submitted in September. Final cost estimates, LP optimizations and economics are being prepared." In a chart on the following page, titled "Pine Bend Expansion Comparison," the number 157.5 appears as the "total" under the column for "Expansion Case (MB/D)." The first two statements in the Board notes must refer to the 155,000 B/D expansion, given the on-going nature of the stated expansions and the numbers on the following page. The statement regarding the permit, however, could possibly refer to an expansion beyond 155,000 B/D. Nonetheless, it is significant that KII did not

apply for a permit which might have pertained to a 175,000 B/D expansion until September 1983.

• a 9/26/83 Memo from KII employee T.W. Segar to KII President Bernard Paulson, stating, "1. Koch presently has a refinery capacity of 137,000 B/D crude oil and is operating at or near maximum. 2. Expansion plans are to add a third crude unit of 70,000 B/D to raise design capacity to 207,000 B/D." This memo indicates KII may have abandoned all of the options for expansion to 175,000 B/D studied by Litwin, opting instead for a more aggressive expansion plan. Thus, this document constitutes evidence of KII's tentative approach, as of June, 1983, to a possible 175,000 B/D expansion, something less than "making plans."

• a 10/13/83 Memo Sheet from First National Bank of Chicago's Annual Review of Koch, which states, "Koch is considering expanding the [Pine Bend] refinery to 175,000 BPD and 'exporting' the additional product into Chicago, Des Moines, and Kansas City areas to take advantage of the markets formerly served by refineries which have closed." This reference to the 175,000 B/D is inconsistent with the prior document (the 9/26/83 memo), but perhaps First Chicago was relying on older information. More significantly, KII apparently was telling First Chicago in October 1983 that it was merely "considering" this expansion possibility.

• on 11/16/83, KII publicly announced its plan of adding a third crude unit to expand to 207,000 B/D. Again, this commitment to a more aggressive expansion indicates KII had abandoned the two options which Litwin investigated that would have increased Pine Bend's crude production to a mere 175,000 B/D.

• 12/8-9/83 KII Board of Directors Meeting Supplemental Information:

> At the August 1983 Board Meeting, a combined project to expand Pine Bend Crude capacity to 175 MB/D

and construct two 10 MB/D hydrotreaters using equipment purchased from Sohio was presented. Several significant changes have occurred since August and the current status of the project is discussed below.

. . . .

Modifications to the [No.] 2 crude unit during the September turnaround has increased crude capacity to 155 MB/D.... Although a crude expansion still appears to be economically attractive, additional analysis is required due to the reduced Canadian crude availability and expanded base capacity.

In November, permit application was made to the Minnesota agencies for construction of a 70 MB/D grass roots crude unit in order to expedite permitting, which normally requires approximately one year to complete. Currently, two cases are being evaluated: (1) Expand the [No.] 1 crude unit from 40 MB/D to 70 MB/D and (2) Construct a new 70 MB/D crude unit and shut down the [No. 1] crude unit. The permit application would be adequate for either alternative.

. . . . .

Major efforts currently are directed toward attaining the permits necessary to expand the crude unit. Analysis is progressing on the two alternate cases under various crude availability and product marketing scenarios.

This discussion apparently revives consideration of the Litwin options, or perhaps these options never were abandoned, despite the implications of earlier documents. As of December 1983, however, the 175,000 B/D expansion option was still mired in the "analysis" stage and KII simply was continuing to explore this possibility.

• 2/21/84, Fourth Quarter Report from Bernard Paulson: "We have applied for permits to increase our permitted capacity to crude to 200,000 B/D and expect it to take over a

year to secure the permit. We would plan to be running to 170,000 B/D in 1986." At this stage, some eight months following execution of the SPA, KII was indeed making plans for an interim expansion at least approaching 175,000 B/D with an ultimate expansion to approximately 200,000 B/D.

- 3/6/84 KII Inter-company notes, stating, "Bernie Paulson in charge of Refineries stated that in 1983 the Pine Bend Refinery had a capability of handling 138,000 barrels of crude oil and in 1984 that would increase to 152,000 barrels per day with the goal of being 170,000." Again, it seems that now KII had made a more definite commitment to the nearly 175,000 B/D expansion. These references to 170,000 B/D, however, do cast doubt on KII's pre-SPA level of commitment to the 175,000 B/D expansion possibility.

- 5/7/84, First National Bank of Chicago's Annual Review of KII: "Also under consideration are the replacement of the No. 1 crude unit for efficiency and the expansion and revamping of the fluid unit." Contrary to the prior two documents, this review indicates that as late as May of 1984 KII was still only "considering" this expansion.

- In Bernard Paulson's deposition testimony, he stated,

> "We did have Litwin review the possibility of expanding the No. 1 crude unit.... It was a rather short cursory look at it, this is January 26, I assume the latter part of '82. I don't think they spent a lot of time at it.... [W]e did not do it and rejected it I think because it was too much money, you know, it was not effective."

APPENDIX B

2 F.Supp.2d 1385

United States District Court,
D. Kansas.

William I. KOCH, et al., Plaintiffs,

v.

KOCH INDUSTRIES, INC., et al., Defendants.

No. 85-1636-SAC.

March 20, 1998.

Clifford L. Malone, Adams, Jones, Robinson & Malone, Wichita, Thomas E. Wright, Wright, Henson, Somers, Sebelius, Clark & Baker, LLP, Topeka, Harry L. Najim, Najim Law Offices, Wichita, John T. Hickey, Jr., Alex Dimitrief, Kirkland & Ellis, Chicago, IL, Ellen A. Cirangle, Bartlit, Beck, Herman, Palenchar & Scott, Denver, CO, Gregory S.C. Huffman, L. James Berglund, II, Thompson & Knight, Dallas, TX, Russell E. Brooks, Milbank, Tweed, Hadley & McCloy, New York, NY, Stephen M. Joseph, Redmond & Nazar, L.L.P., Wichita, Michael Paul Kirschner, Lee & Kirschner, P.L.L.C., Oklahoma City, OK, for William I Koch, Oxbow Energy Inc, L.B. Simmons Energy Inc. dba Rocket Oil Company, United States Trust Company of New York, as Trustee, Spring Creek Art Foundation Inc, Gay A. Roane, Ann Alspaugh, Marjorie Simmons Gray, as Trustee, Northern Trust Company, as Trustee, Marjorie L. Simmons, as Trustee, Louis Howard Andres Cox, Paul Anthony Andres Cox, Holly A. Andres Cox Farabee, Frederick R. Koch, Nationsbank

N.A, co-trustee of the Louis Howard Andres Cox Trusts B & D, plaintiffs.

James M. Armstrong, Robert L. Howard, Timothy B. Mustaine, Foulston & Siefkin L.L.P., Donald L. Cordes, Koch Industries, Inc., Wichita, for Koch Industries Inc., Charles G. Koch, Sterling V. Varner, David H. Koch, Donald L. Cordes, Thomas M. Carey, defendants.

Michael W. Merriam, Gehrt & Roberts, Chartered, Daniel R. Lykins, Bryan, Lykins & Hejtmanek, P.A., Topeka, for Kansas Press Association, Kansas Association of Broadcasters, Wichita Eagle-Beacon, Topeka Capital-Journal, WIBW-TV, Kansas City Star Company, the Wichita Business Journal, Harris Enterprises, Inc., Koch Crime Comm, movants.

MEMORANDUM AND ORDER

CROW, Senior District Judge.

The case comes before the court on a number of pretrial filings. The plaintiffs have filed the following motions *in limine*: Number 1 – Post 1985 Lawsuits (Dk.663); Number 2 – Plaintiffs' Consultations with Health Professionals (Dk.664); Number 3 -- Plaintiffs' Lifestyles (Dk.664); Number 4 – Plaintiffs' "Reneging" on other Business Deals (Dk.664); Number 5 – Plaintiffs' Post Filing Investigations of Defendants (Dk.664); Number 6 – Pretrial Judicial Commentary (Dk.665); Number 7 – Withdrawal or Dismissal of Claims (Dk.666); and Number 8 – Lawyers and Experts (Dk.667). The defendants have filed the following motions *in limine*: Number 1 – Exclude Allegations of Document Destruction (Dk.668); Number 2 – Exclude Improper Testimony on Accounting Issues (Dk.669); Number 3 – Exclude Testimony of Kenneth McGraw on Changed Method of Valuation and Assignment of Value to Premium for Control (Dk.670); and Number 4 – Exclude Testimony of John O'Brien on Value of Pine Bend Refinery (Dk.671). After duly consider-

ing the memoranda and all relevant law, the court rules as follows.

GENERAL RULES GOVERNING MOTIONS *IN LIMINE*

The motion *in limine* is a creature of neither the Federal Rules of Civil Procedure nor the Federal Rules of Evidence. *Deghand* v. *Wal-Mart Stores, Inc.*, 980 F. Supp. 1176, 1179 (D.Kan.1997). Its purpose is "'to aid the trial process by enabling the Court to rule in advance of trial on the relevance of certain forecasted evidence, as to issues that are definitely set for trial, without lengthy argument at, or interruption of, the trial.'" *Palmieri* v. *Defaria*, 88 F.3d 136, 141 (2nd Cir.1996) (quoting *Banque Hypothecaire Du Canton De Geneve* v. *Union Mines, Inc.*, 652 F. Supp. 1400, 1401 (D.Md.1987)). Besides saving trial time, pretrial rulings often may save the parties time, effort and cost in preparing and presenting their cases. *Pivot Point Intern., Inc.* v. *Charlene Products, Inc.*, 932 F. Supp. 220, 222 (N.D.Ill.1996). On the other hand, a court is almost always better situated during the actual trial to assess the value and utility of evidence. For this reason, some courts defer making *in limine* rulings unless the "evidence is clearly inadmissible on all potential grounds." *Hawthorne Partners* v. *AT & T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D.Ill.1993) ("Unless evidence meets this high standard, evidentiary rulings should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in proper context.").

Having a deep appreciation for the potential savings from *in limine* rulings, this court does not take the strict approach followed by some courts. Still, the court believes the better practice is to wait until trial to rule on objections when admissibility substantially depends upon what facts may be developed there. *See Sperberg* v. *Goodyear Tire & Rubber Co.*, 519 F.2d 708, 712 (6th Cir.), *cert. denied*, 423 U.S. 987, 96 S.Ct. 395, 46 L.Ed.2d 303 (1975); *Hunter* v. *Blair*, 120 F.R.D. 667 (S.D.Ohio 1987). This is particularly the case when a ruling *in limine* would have little impact on the par-

ties' evidentiary burdens or preparation for trial. *Cipollone* v. *Liggett Group, Inc.*, 644 F.Supp. 283, 286 (D.N.J.1986). The movant has the burden of demonstrating that the evidence is inadmissible on any relevant ground. *Plair* v. *E.J. Brach & Sons, Inc.*, 864 F. Supp. 67, 69 (N.D.Ill.1994). The court may deny a motion *in limine* when it "lacks the necessary specificity with respect to the evidence to be excluded." *National Union* v. *L.E. Myers Co. Group*, 937 F. Supp. 276, 287 (S.D.N.Y.1996).

At trial, the court may alter its limine ruling based on developments at trial or on its sound judicial discretion. *Luce* v. *United States*, 469 U.S. 38, 41, 105 S. Ct. 460, 83 L. Ed.2d 443 (1984). "Denial of a motion *in limine* does not necessarily mean that all evidence contemplated by the motion will be admitted at trial." *Hawthorne Partners* v. *AT & T Technologies, Inc.*, 831 F.Supp. at 1401. Denial only means that the court cannot decide admissibility outside the context of trial. *Plair* v. *E.J. Brach & Sons, Inc.*, 864 F. Supp. at 69. A ruling *in limine* does not "relieve a party from the responsibility of making objections, raising motions to strike or making formal offers of proof during the course of trial." *Thweatt* v. *Ontko*, 814 F.2d 1466, 1470 (10th Cir.1987) (internal quotation omitted).

PLAINTIFFS' MOTIONS *IN LIMINE*

By their motions, the plaintiffs seek an order *in limine* that would exclude all references and evidence concerning eight separate areas. Based on the memoranda filed in response and reply, the court believes the parties agree that a *limine* order should issue on three of those areas. Thus, the court orders that all parties and counsel are precluding from presenting evidence or referring to the following:

> 1) The parties' personal lives or lifestyles, including their marital or other personal relationships, recreational interests, hobbies, passions, political or religious beliefs or unrelated financial endeavors;

2) The comments, findings, or rulings made by this court or any other court concerning the plaintiffs, the defendants or any of the claims in this case or any other litigation involving these parties; and

3) The plaintiffs' counsel or experts who have withdrawn or been replaced during this litigation, except for showing witness bias through evidence of what prior counsel may have instructed and paid expert witnesses.

The parties do not agree on the other five areas and leave them to the court for decision. Before turning to these areas, the court will summarize that law common to its rulings.

"Relevant evidence" is that evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid. 401. "Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." Fed.R.Evid. 401 adv. comm. note. "All relevant evidence is admissible except" when exclusion is called for by the rules, by the statutes, or by constitutional considerations. Fed.R.Evid. 402. For example, the court may exclude relevant evidence when "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed.R.Evid. 403.

Because one side or the other will almost always consider a piece of evidence to be prejudicial, courts generally believe the jury is best able to determine the truth when given access to all the relevant admissible evidence. *S.E.C.* v. *Peters*, 978 F.2d 1162, 1171 (10th Cir.1992). Consequently, Rule 403 sets a standard for exclusion that is "somewhat exacting." *C.A. Associates* v. *Dow Chemical Co.*, 918 F.2d 1485, 1489 (10th Cir.1990). Rule 403 considerations impacted by the evidence

must "substantially outweigh" its probative value. The Tenth Circuit "on numerous occasions" has said that "'exclusion of relevant evidence under Rule 403 is an extraordinary remedy to be used sparingly.'" *Wheeler* v. *John Deere Co.*, 862 F.2d 1404, 1410 (10th Cir.1988) (citations omitted); *see Joseph* v. *Terminix Intern. Co.*, 17 F.3d 1282, 1284 (10th Cir.1994). Balancing the probative value of and need for evidence against the competing considerations of Rule 403 is a task for which the trial judge by his position and familiarity with the case is particularly well suited. *McAlester* v. *United Air Lines, Inc.*, 851 F.2d 1249, 1257 (10th Cir.1988). In weighing the factors under Rule 403, the court should generally "'give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value.' 1 J. Weinstein & M. Burger, Weinstein's Evidence ¶ 403[03], at 403-25 to 403-26 (1982)." *K-B Trucking Co.* v. *Riss Intern. Corp.*, 763 F.2d 1148, 1155 n. 9 (10th Cir.1985). Finally, a 403 inquiry focuses on whether the evidence results in "unfair prejudice," that is, does the evidence have "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Fed.R.Evid. 403 adv. comm. note. *See Espeaignnette* v. *Gene Tierney Co., Inc.*, 43 F.3d 1, 7 (1st Cir.1994) (Undoubtedly, "all evidence is meant to be prejudicial; elsewise, the proponent would be unlikely to offer it.").

"Although not specifically mentioned in the Rules, proof of bias," that is, any evidence of a relationship, circumstance or motivation " 'which might lead a witness to slant, unconsciously or otherwise, his testimony' " is " 'almost always relevant.'" *United States* v. *Spencer*, 25 F.3d 1105, 1109 (D.C.Cir.1994) (quoting *United States* v. *Abel*, 469 U.S. 45, 52, 105 S. Ct. 465, 83 L. Ed.2d 450 (1984)). "A successful showing of bias on the part of a witness would have a tendency to make the facts to which he testified less probable in the eyes of the jury than it would be without such testimony." *United States* v. *Abel*, 469 U.S. at 51, 105 S. Ct. 465. Courts

generally are "liberal" in admitting evidence of bias because a jury "must be sufficiently informed of the underlying relationships, circumstances, and influences operating on the witness to determine whether a modification of testimony reasonably could be expected as a probable human reaction." 4 Jack Weinstein & Margaret Berger, Weinstein's Federal Evidence § 607.04[1] (2d ed.1997). "Proof of a witness's motivation or potential bias is critical when the witness is a party and key witness to the alleged events." *Cf. Henry* v. *Speckard*, 22 F.3d 1209, 1215 (2nd Cir.), *cert. denied*, 513 U.S. 1029, 115 S. Ct. 606, 130 L. Ed.2d 517 (1994). "[T]he range of evidence that may be elicited for the purpose of establishing bias of a witness is quite broad." 4 Jack Weinstein & Margaret Berger, Weinstein's Federal Evidence § 607.04[3] [b] (2d ed.1997).

Post 1985 Lawsuits

The plaintiffs ask the court to "prohibit any references at trial and exclude any evidence offered by defendants concerning other lawsuits involving the plaintiffs that were initiated after June 7, 1985." (Dk.663, p. 1). In their motion, the plaintiffs list fifteen other lawsuits that involve one or more of the plaintiffs or defendants and that were filed after 1985. The plaintiffs also refer to the defendants' accusation that William Koch was "instrumental" in providing information that led to investigations by a United States Senate and grand jury into Koch Industries, Inc. ("KII") on the issue of "oil-stealing." (Dk.663, p. 3). The plaintiffs argue that the defendants have already used in the summary judgment proceedings and intend to use at trial these other lawsuits to portray the plaintiffs, in particular William Koch, "as litigious and as 'sponsoring' 'unsuccessful' litigation." (Dk.663, p. 3).

The plaintiffs argue the other lawsuits are unrelated to the merits of the instant case and, thus, are not relevant under Fed.R.Evid. 402. Because these lawsuits were subsequent to the instant case, they do not show any relationships or states of mind that would be relevant here. To the extent that the

other lawsuits may reveal motives behind their filing of them, such motives cannot be linked to this lawsuit and, more importantly, the plaintiffs' motives for bringing this lawsuit are not relevant to its merit. If the defendants' intend to use this evidence to show the plaintiffs' proclivity to litigate, the plaintiffs argue the same would be inadmissible under Rules 403 and 404. A "plaintiff's 'litigiousness may have some slight probative value ... that value is outweighed by the substantial danger of jury bias against the chronic litigant' " and is a character trait subject to Rule 404(b) concerns. *Outley* v. *City of New York*, 837 F.2d 587, 592 (2nd Cir.1988) (quoting *Raysor* v. *Port Authority*, 768 F.2d 34, 40 (2nd Cir.1985), *cert. denied*, 475 U.S. 1027, 106 S. Ct. 1227, 89 L. Ed.2d 337 (1986)). The plaintiffs emphasize that "opening up this area thus invites detailed inquiries, denials, and explanations, likely to lead to multifariousness and a confusion of issues." *Outley*, 837 F.2d at 595.

The defendants say they agree with an order *in limine* precluding all parties from making any reference to the following eight cases:

> *In re Ann A. Linn*, filed February 3, 1988, in the United States Bankruptcy Court for the Western District of Oklahoma, Case No. 88-00711-TS.
>
> *In re James P. Linn*, Debtor, filed February 3, 1988, in the United States Bankruptcy Court for the Western District of Oklahoma, Case No. 88-00712-TS.
>
> *International Oil Resources, Inc.* v. *Michael P. Aquilina, et al./Michael P. Aquilina* v. *William I. Koch, et al.*, filed March 3, 1988, in the United States District Court for the Central District of California, Case No. CV 88-01168 PAR (GXKx).
>
> *Ann A. Linn* v. *James P. Linn*, decree of divorce filed January 5, 1989, in the District Court of Oklahoma County, Oklahoma, Case No. FD-88-8451.

United States of America, ex rel. The Precision Company v. *Koch Industries, Inc., et al.*, ("*Precision I*"), filed May 25, 1989, in the United States District Court for the Northern District of Oklahoma, Civil Action No. 89-C-437-C.

United States of America, ex rel. The Precision Company v. *Koch Industries, Inc., et al.*, ("*Precision II*"), filed September 30, 1991, in the United States District Court for the Northern District of Oklahoma, Civil Action No. 91-C- 763-B.

Louis Howard Andres Cox v. *William I. Koch, et al.*, filed November 21, 1991, in the United States District Court for the Western District of Oklahoma, Case No. CIV-91-1921-A.

Marjorie Simmons Gray, et al. v. *Louis Howard Andres Cox*, filed November 21, 1994, in Probate Court, Harris County, Texas Case No. 271283.

Thus, the court grants the plaintiffs' motion in part and orders all parties not to refer to the above eight cases.

The defendants argue that they intend to refer to the following seven lawsuits, evidence of which they believe is relevant:

Koch Industries, Inc. v. *William I. Koch, et al.*, filed May 4, 1987, in the United States District Court for the District of Kansas, Civil Action No. 87- 1249-C.

William I. Koch v. *Charles G. Koch, et al.*, filed August 14, 1987, in the Eighteenth Judicial District for Sedgwick County, Case No. 87-C-3006.

Oxbow Energy, Inc. et al. v. *Koch Industries, Inc., et al.*, filed August 26, 1987, in the United States District Court for the District of Kansas, Civil Action No. 87-2436-S.

William I. Koch and Frederick R. Koch v. *Charles G. Koch, et al.*, filed May 19, 1988, in the Eighteenth Judi-

cial District Court for Sedgwick County, Case No. 88-C-1782.

Charles G. Koch, et al. v. *William I. Koch*, filed May 23, 1988, in the United States District Court for the District of Kansas, Civil Action No. 88-1320-K.

William I. Koch v. *United States*, filed August 3, 1988, in the United States Claims Court, Docket No. 466-88T.

In the Matter of the Estate of Mary R. Koch, Deceased, filed December 20, 1990, in the Eighteenth Judicial District Court, Sedgwick County, Kansas, Probate Department, Case No. 90-P-1491.

The defendants believe evidence of these lawsuits is admissible to demonstrate the bias of William Koch and thereby impeach his testimony and also admissible to prove that William Koch did not rely on the defendants, in particular Charles and David Koch, for disclosure of all facts material in his decision to sell the stock. The defendants argue that William Koch's animosity for his brothers, Charles and David, is so intense that he has an ongoing vendetta against them and KII. The defendants insist this animosity is revealed in part by William Koch's pattern of suing his brothers.

Instead of the settlement that resulted in the 1983 Stock Purchase Agreement ("SPA"), William Koch wanted to continue with the litigation. Besides filing the instant case, William Koch pursued other expensive litigation against his brothers. He sued over the family charitable foundation and its distribution of funds to beneficiaries, he named his mother as a co-defendant in one suit involving the foundation, and he even challenged his mother's will as it conditioned his inheritance upon him terminating the pending family litigation. Charles and David Koch also sued William for specific performance when William allegedly reneged on his promise to his brothers to have certain property appraised and exchanged by agreement. The defendants assert that William Koch's

financial interest in these other lawsuits is so modest as to reveal that William is driven by his animosity to sue his brothers.

The defendants point out that William Koch is not only the lead plaintiff, but he will likely be the fact witness most critical to the plaintiffs' success. In addition, William Koch assumed a leadership role with respect to the other selling shareholders and possessed more technical knowledge of the facts and issues by reason of his education, training and experience. The defendants anticipate that the plaintiffs will attempt to paint their litigation as one of strictly business and not personal matters. The defendants want to use this other litigation to show that the plaintiffs have pursued litigation against them when business could not have been the motive. Finally, the defendants maintain this evidence shows that William Koch has "harbored longstanding mistrust toward defendants" which makes it less probable that he relied on their disclosures in deciding to sell. (Dk.689, p. 8).

In reply, the plaintiffs ask the court to "preclude defendants from making any allegations or introducing any evidence suggesting that Bill Koch is engaged in an 'ongoing vendetta' or has an 'obsessive hatred' of Charles and David Koch." (Dk.704, p. 3). The plaintiffs insist such evidence is manifestly prejudicial and should be excluded under Rule 403. The plaintiffs dispute any effort to characterize this litigation as the product of family strife as opposed to the defendants' own fraudulent conduct. The plaintiffs indicate that the family relationships "are at least as complicated in their own right" as the alleged claims for trial. (Dk.704, p. 5). The plaintiffs suggest that "[l]iterally weeks of trial could be devoted" to these family issues and that this would be a serious distraction to the jury. (Dk.704, p. 5).

Ruling

After supervising this case for over a decade, the court believes it has gained some knowledge and insight into what

could be called some of the more important aspects of this litigation. For example, the court understands that William Koch's animosity for Charles and David, the intensity of those feelings, and the actions that reveal those feelings are central to the defendants' case in several regards. First, the defendants believe these feelings serve as explanatory background to most, if not all, of the disputes and conflicts resulting in the filing of the first Koch case, the settlement of that case, and the filing of the case now going to trial. Second, these feelings are plainly relevant in determining whether William Koch actually trusted and relied upon the defendants to make full and complete disclosures. Third, these feelings directly bear on William Koch's credibility as a fact witness to the plaintiffs' knowledge and to the defendants' representations and omissions. The court will not eviscerate the defendants' case by precluding them from using relevant evidence to prove these critical points.

It seems undeniable to the court that the issues of this case are inextricably tied to the parties' familial relations. They are the backdrop that explain so many features of this complex litigation, beginning with why the parties were shareholders in KII. Enmeshed in their business dealings and this litigation is the state of the parties' familial relations. Such relations irrefutably trigger emotions that can and may affect the judgment of those involved. For that simple reason, a party cannot simply label the situation as a business dispute and make himself or itself immune from evidence concerning possible emotional motives. The court fully appreciates that emotional responses are highly personal, often depend on many circumstances, and may change frequently. Even so, jurors in almost every case are asked to rely on their own experiences and common sense in discerning what are the witnesses' and parties' likely emotions and motives and what would one reasonably expect from persons acting on those emotions or motives. Evidence on such matters is almost always relevant, and this case is no exception but a good exam-

ple of when such evidence may be relevant. The court is simply convinced that the trial of this case cannot be divorced from the familial relations, problems, conflicts and disputes without seriously misleading the jury.

The plaintiffs' concerns that the evidence of these other lawsuits will be used to paint the plaintiff as a "litigious character" who files lawsuits devoid of merit are overstated and maybe even misplaced. The court does not understand the defendants as intending to use this evidence for this objectionable reason. Upon a timely objection, the court would cut off any effort to use this evidence only for that reason.[1] Besides controlling the extent of inquiry, the court would consider giving a limiting instruction to minimize the potential for unfair prejudice and/or delay from this evidence. *See S.E.C.* v. *Peters*, 978 F.2d at 1172-73.

That these lawsuits were filed after 1985 does not significantly diminish their probative value in showing William Koch's bias at trial and his attitude towards his brothers at the time of the SPA. William Koch's willingness to sue the Koch Foundation and even his mother over another dispute with his brothers has probative value in revealing the degree or intensity of his alleged animosity towards his brothers. The jury is entitled to hear evidence and decide the extent of bias. *Heath*

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[1] At this time, the court does not consider the defendants' reference and use of these lawsuits in proving bias and reliance as necessarily opening the door to the plaintiffs' use of the *Precision qui tam* litigation to show that William Koch brings meritorious suits against his brothers. The defendants argue the principal evidentiary value of these other lawsuits is to reveal and substantiate William Koch's animosity for his brothers, the intensity of William Koch's feelings, and the conduct probably resulting from those feelings. To avoid lengthy delay, the court would hope that the defendants can offer this evidence for these specific grounds without delving into the details, actual merit or judicial outcome of those lawsuits. For the same reason, the court would hope that the plaintiffs can refute the specific grounds for which this evidence is offered without inserting the details, actual merit or judicial outcome of those lawsuits or any other lawsuits.

v. *Cast*, 813 F.2d 254, 259 (9th Cir.), *cert. denied*, 484 U.S. 849, 108 S. Ct. 147, 98 L. Ed.2d 103 (1987). The court denies the request for an order *in limine* covering these other lawsuits or evidence suggesting that William Koch is engaged in an "ongoing vendetta" against his brothers, Charles and David Koch.

Plaintiffs' Consultations with Health Professionals

Citing *United States* v. *Jackson*, 863 F.Supp. 1462, 1465 (D.Kan.1994), *aff'd*, 76 F.3d 1145 (10th Cir.1996), the plaintiffs argue that evidence of the plaintiffs' consultations for psychological or psychiatric purposes is irrelevant to the issues here and is subject to exclusion as unfairly prejudicial under Rule 403. The defendants say they "intend to show that William Koch's lifelong history of feelings of inferiority and troubled relations with his brothers ... were the focus of his psychiatric treatment and that part of his psychotherapy was to 'climb out of his depression over the backs of his family.'" (Dk.689, p. 11). The defendants argue the same explains William Koch's multiple lawsuits and his animosity toward Charles Koch.

Ruling

The defendants' intended use of this evidence is not to attack William Koch's ability to perceive the events at issue, to recall clearly the events, or to testify accurately and truthfully about them. The defendants want to introduce evidence of William Koch's "psychiatric treatment" and "psychotherapy" as proof of his troubled feelings toward his brother Charles and as an explanation for this litigation being part of his therapy. This evidence plainly has probative value to the extent that it tends to show William Koch's hatred and distrust of Charles Koch and William Koch's efforts or actions as a result of these feelings. Because neither side discloses the specifics of this evidence and, in particular, the manner in which it would be introduced, the court is not in a position to assess and balance the relevant considerations under Rule

403. The court will not exclude the evidence at this time simply because such evidence could be embarrassing and personally intrusive. Having failed to carry their burden, the plaintiffs are denied an order *in limine* excluding evidence that the focus of the plaintiff William Koch's "psychiatric treatment" and "psychotherapy" was his troubled relations with his brothers.

Plaintiffs' "Reneging" on Other Business Deals

This evidence concerns William Koch's refusal to pay Goldman Sachs the full fee under the contract and refusal to pay Jim Linn a promised fee for his work in settling *Koch I*. The plaintiffs argue this evidence is without probative value to this case or to the credibility of the plaintiffs and should be excluded under Rule 403 because of "the very profound danger of unfair prejudice implicit in raising accusations that the plaintiffs have 'reneged' on various agreements." (Dk.664, p. 5). The defendants argue the evidence is relevant in showing William Koch's animosity toward his brothers and "attitude toward those whom he viewed as instrumental in pushing the settlement at $200 per share." (Dk.689, p. 12).

Ruling

The court sees minimal relevance in whether William Koch actually paid the full contract fee to Goldman Sachs or the promised settlement fee to Jim Linn. The court anticipates there will be a substantial amount of other evidence indicating that William Koch was not pleased with the $200 price at the time of the SPA. There does appear some potential for unfair prejudice if the jury would infer from this evidence that William Koch is someone who breaches agreements. The court sustains the plaintiffs' motion *in limine* to exclude this evidence.

Plaintiffs' Post Filing Investigations of Defendants

This evidence concerns William Koch hiring a private investigator in 1992 to search the trash of Charles Koch, Donald Cordes, Robert Howard or James Armstrong, and the de-

fendants' law firm. On the defendants' application, the court entered a temporary restraining order ("TRO") on March 25, 1992, that in part restrained the plaintiffs and their agents or investigators from "invading or interfering with the privacy and confidentiality interests of the defendants, their counsel, and their immediate families, either through efforts to obtain the trash from the personal residences or the offices" of the defendants or their counsel. (Dk.450, p. 2). The plaintiff William I. Koch filed a memorandum in opposition to the continuation of the TRO and attached his declaration in which he said these investigatory efforts were taken in an effort to learn how the defendants were gaining access to documents within his corporation. (Dk.452). William Koch further affirmed that he had terminated all such investigation efforts. "[B]ased upon statements of counsel made in" court, the defendants consented to the court ordering the dissolving the TRO on March 31, 1992. (Dk.456). The plaintiffs argue this evidence is irrelevant to the issues, is not probative of William Koch's credibility, and is unfairly prejudicial. The defendants argue that William Koch's "bizarre" and self- directed efforts at investigating the defendants and their counsel is "evidence of William Koch's obsessive vendetta against his brothers and those aligned with them."

Ruling

This evidence arguably has some probative value in that gives the jury some insight into the intensity of the feelings involved and the actions possibly taken as a result of them. The court's principal reservation with this evidence is that it logically opens the door for an inquiry into all private investigatory activities involved in this case. For the plaintiffs to refute this evidence, William Koch presumably will testify about his own concerns of investigation, surveillance and covert document collection being directed at him and his associates. A number of serious issues present themselves once we start down that collateral path. The court believes this evidence is not so important to the defendants' case as to risk

the issues and delay likely to arise with this evidence. Frankly, the jury will have enough opportunities to be confused over the facts and issues in this case without inserting a detective mystery novella. The court grants the plaintiffs' motion *in limine* and orders all parties and counsel to not present evidence nor refer to any investigations or surveillance of the personal residences and offices of the parties, their counsel and agents.

Withdrawal or Dismissal of Claims

The plaintiffs seek an order prohibiting any references at trial and excluding any evidence regarding the plaintiffs' withdrawal of claims or the court's dismissal of claims. The plaintiffs argue such evidence or remarks are not relevant to the claims and issues remaining for trial. If the defendants raise this matter, the plaintiffs insist they are entitled to an opportunity to explain the former claims in order to rebut the implication that these claims were not made in good faith. The defendants agree that no evidence should be admitted by either side concerning the dismissal or withdrawal of any claim or defense in this case. The defendants, however, do intend to introduce evidence that William began investigating KII shortly after the SPA, that William Koch sent a pre-suit demand letter in 1985, and that the claims going to trial were not part of the case when it was filed. The plaintiffs reply that the pre-suit demand letter and the later addition of these claims is not relevant.

Ruling

The court grants the plaintiffs' motion insofar as both sides agree that no evidence should be admitted by either side concerning the dismissal or withdrawal of any claim or defense in this case. The court does not consider the following evidence to have been covered by the plaintiffs' original motion *in limine*: that William began investigating KII shortly after the SPA, that William Koch sent a pre-suit demand letter in 1985, and that the claims going to trial were not part of the

case when it was filed to be covered by the plaintiffs' original motion. The court alternatively denies the plaintiffs' request to exclude this other evidence described by the defendants. The court believes the fact that these claims were omitted from the plaintiffs' pre-suit demand letter and original complaint could be relevant to the statute of limitations defense asserted by some of the defendants.

DEFENDANTS' MOTIONS *IN LIMINE*

Allegations of Document Destruction

The defendants seek an order prohibiting the plaintiffs from mentioning any alleged destruction of evidence relating to this case or any other litigation involving the defendants, including: 1) document destruction evidence from the Oklahoma litigation; 2) the gap in document production concerning the alleged Williams Pipeline reversal agreement; and 3) Peat Marwick's destruction of its audit work papers for 1981 and 1982. The defendants note that the court has denied the plaintiffs' two attempts to re-open discovery on the allegation of document destruction. The defendants argue the so-called "ominous gap" in KII's documents on the Williams Pipeline reversal agreement is not suspicious and if presented to the jury would be prejudicial and confusing and would unduly prolong the trial. Finally, the defendants note that there is no reasonable basis for believing that Peat Marwick's destruction of its work papers before the plaintiffs ever pleaded their accounting claims was improper or wrongful.

The plaintiffs say they do not intend to introduce any evidence concerning document destruction in the Oklahoma litigation. The plaintiffs argue evidence on the other two matters is relevant and admissible in this case. The plaintiffs point out that the defendants did not produce any documents from the period between December 1982 to June 1983 that addressed the Williams Pipeline reversal negotiations or alleged agreement. Documents dated October of 1982 refer to negotiations with Williams Pipeline including plans to "loop the

receiving line from" Pine Bend Refinery to Williams Pipeline's Rosemount station. (Dk.691, Ex. A). Sterling Varner's notes from the same time period also refer to Williams Pipeline laying the pipeline from Pine Bend to Rosemount. The next document concerning the Williams Pipeline reversal that was produced by the defendants is an inter-company memorandum dated June of 1983 and addressed to W. Hanna and others concerning the "Pine Bend Desulfurizer/Hydrocracker Basis." The memorandum includes the comment that "[t]he ability to pump gasoline south on Williams will allow production above the current 80 MB/D economic marketing limit." (Dk.691, Ex. C). According to the plaintiffs, this is document gap, the period between October 1982 and June 1983, shown by what the defendants produced during discovery.

The plaintiffs say they have found in public files certain relevant documents from this period of the document gap. The plaintiffs attach copies of documents they obtained from the Dakota County, Minnesota Department of Highways that include correspondence and permit applications filed by Williams Pipeline dated between March of 1983 and June of 1983. These documents discuss Williams Pipeline's construction of a pipeline between the refinery and the Rosemount station. The permit application states that Williams' work would commence on or after May 1, 1983, and would be completed by September 1, 1983.

As for the Peat Marwick work papers, the plaintiffs say that "if the defendants rely upon Peat Marwick's audit certificate as some sort of blessing of their financial statements, plaintiffs should be allowed to inform the jury that the work papers for the audit were destroyed." (Dk.691, p. 6). The plaintiffs believe the absence of the work papers is relevant in evaluating the weight of Peat Marwick's audit opinion. An auditor relies upon representations made by the company's management, and an auditor's opinion is necessarily based in part on what management disclosed or failed to disclose to the

auditor. The auditor's work papers are some evidence of what were the company's representations on which the auditor relied. That Peat Marwick destroyed the papers is simply a fact which explains the absence of the work papers which normally would be relevant evidence in evaluating the weight of an auditor's opinion.

Ruling

Consistent with the parties' agreement, the court directs the parties to refrain from arguing or referring to the document destruction allegations or evidence in the Oklahoma litigation. The court denies the defendants' motion *in limine* concerning the other two areas of document destruction. The gap in KII's production of documents on the Williams Pipeline reversal may be a relevant point for argument assuming that the plaintiffs can show a reasonable basis for inferring that relevant documents from that time period should have been in the defendants' possession. The jury is entitled to draw inferences based on the absence of documents that one would reasonably expect to be in a party's possession. Peat Marwick's destruction of its work papers is relevant in the event that the defendants introduce and rely on Peat Marwick's audit opinions for 1981 and 1982. In evaluating the weight of those audit opinions, the jury should be told that the opinions cannot be checked against the underlying work papers, because the latter documents were destroyed as part of Peat Marwick's regular six-year retention policy. The court would consider giving a requested limiting instruction that addressed the defendants' concerns over other possible adverse inferences being drawn from this evidence. Thus, the court denies the defendants' motion *in limine* except for ordering the parties to refrain from mentioning the document destruction allegations and evidence in the Oklahoma litigation.

Improper Testimony Relating to Accounting Issues

The plaintiffs have designated two witnesses to testify as experts in accounting, K. Gary Gibbs ("Gibbs") and Alan May, Jr ("May"). The defendants seek to exclude that portion of Gibbs' testimony which they argue is Gibbs' interpretation of the SPA and to exclude the entirety of May's testimony which they argue is without a factual foundation and is nothing more than his vouching for Gibbs' conclusions and credibility. The plaintiffs dispute the defendants' characterizations of Gibbs' and May's testimony.

In the court's summary judgment order, the following paragraph appears:

> 13. Gibbs testified that the $3.1 million of losses on Kerr McGee and Northwest Portland Cement shares included in Hall's list were "not necessarily" unusual or infrequently occurring. (DX-Acct 14, p. 425). He included them as unusual or infrequent, because they were on Hall's list and because their disclosure would be required by ¶ 5(d) of the SPA. Hall's list included $2.6 million for a dry hole in Columbia. Gibbs testified that he generally did not consider dry holes to be "unusual" or "infrequently recurring" and that dry holes did not necessarily meet those definitions. He opined that ¶ 5(d) of the SPA required disclosure and that disclosure would "make the financial statements informative and useful." (DX-Acct 14, p. 435-36). Gibbs also avers he included the dry hole expenses as non-recurring because they were on Hall's list and Hall testified all of the listed expenses were non-recurring. (PX 430, ¶ 11).

969 F.Supp. at 1561 (footnote omitted). In his written report, Gibbs similarly opines that the defendants' failure to disclose the amounts of losses which KII management considered to be "extraordinary losses" and asset "write downs" is contrary to the requirements of ¶ 5(d) of the SPA. (Dk.693, Ex. B, pp. 26-27).

The defendants seek to preclude Gibbs from testifying about any violation of ¶ 5(d) of the SPA arguing that this opinion would be outside Gibbs' accounting expertise, that the opinion requires Gibbs to interpret ¶ 5(d) of the SPA, and that the opinion is based on an interpretation of the SPA that is erroneous as a matter of law. As far as his expertise, Gibbs' understanding of what a prudent investor would want to know is limited, according to the defendants, to the context of what an accountant would consider as material disclosures in connection with preparing financial statements. (Dk.669, Ex. B, p. 241, 243). To opine that ¶ 5(d) is violated, Gibbs must interpret the provisions of that paragraph. In defendants' opinion, Gibbs' interpretation of ¶ 5(d) is erroneous as that paragraph only deals with financial statement matters occurring after December 31, 1982, and these alleged accounting errors in 1982 did not occur after December 31, 1982. Past accounting errors are not kind of current events, conditions, or facts that the parties intended ¶ 5(d) to cover. The defendants argue that the parties intended ¶ 5(c) to address accounting issues connected to past financial statements and intended ¶ 5(d) to cover numerous subject matters that were not covered by the financial statements. They also argue that Gibbs' interpretation of the second sentence in ¶ 5(d) renders superfluous all other provisions in ¶ 5.

The plaintiffs say that the defendants mischaracterize Gibbs' testimony as a legal construction of ¶ 5(d) when it is really being offered on the question whether the defendants' improper accounting treatment of certain expenses "might have materially affected" a prudent investor's valuation of his stock. The plaintiffs deny that Gibbs' written report contains any interpretation of ¶ 5(d), but they admit that Gibbs' opinion on the defendants' accounting omissions violating ¶ 5(d) "reflect[s] a straight-forward application of Section 5(d)'s plain and unambiguous language warranting that defendants have disclosed any information that 'might materially affect the valuation of the stock.' " The plaintiffs also acknowledge

that Gibbs' report does discuss whether defendants' accounting practices were material. The plaintiffs refute any attempt to limit the scope of the warranty found in the second sentence of ¶ 5(d) to events occurring after December 31, 1982. Finally, the plaintiffs complain that a motion *in limine* is not the proper vehicle for asking the court to interpret ¶ 5(d) of the SPA.

The plaintiffs' other accounting expert is Alan May. The defendants seek to exclude the entirety of May's testimony. The defendants first argue that May should not be allowed to give his opinion as he does not have sufficient knowledge of KII's financial information to apply generally accepted accounting principles ("GAAP") principles. The defendants label May a "phantom expert" whom the plaintiffs offer only for the improper purpose of vouching for Gibbs' credibility and conclusions. (Dk.669, p. 9). The defendants believe May's testimony is "nothing more than an argument that the jury should rely upon or draw certain conclusions from" Gibbs' testimony. (Dk.669, p. 11).

The plaintiffs recognize that May did not investigate KII's financial records to determine whether he would categorize the expenses as "unusual" or "infrequently occurring" and that May simply relied on Milton Hall's decision to include these expenses in Hall's list of "Extraordinary Items." The plaintiffs say this is enough for May to render an expert opinion. The plaintiffs explain that May will testify on another area, that is, whether the actual disclosure in the financial statement complies with GAAP. The plaintiffs say that May is competent to testify on the disclosure requirements under GAAP, the types of disclosures required for an accurate valuation of KII, the materiality of defendants' omissions, the effect that the omissions would have on a prudent investor's valuation of stock, and related issues. The plaintiffs say the focus of May's testimony will concern how such items should be properly treated or disclosed under GAAP once they are determined to be "unusual" and/or "infrequently occurring."

In reply, the defendants highlight the following argument found in the plaintiffs' response brief:

> Plaintiffs must show that the way in which they were disclosed (or that they were not disclosed) in the financial statements failed to comply with the requirements of GAAP. Similarly, defendants' disclosures concerning these items may have violated GAAP regardless of whether they were technically "unusual" or "infrequently occurring," as those terms are specifically defined in the accounting literature. As Mr. May explained in his deposition, GAAP requires that footnotes to financial statements "be reasonably adequate for an understanding of the financial statements" and that "when there is a choice of accounting principles that can be or are material to the financial statements, that those principles be disclosed."

(Dk.693, pp. 7-8) (italics added). The defendants sound the alarm that such testimony would exceed the scope of the plaintiffs' accounting claim: "What plaintiffs are saying is that May will redefine the accounting claim so that the jury could find in plaintiffs' favor even if they cannot prove their claim that the items on Mr. Hall's list were 'unusual' or 'infrequently occurring' within the GAAP definitions of those terms." (Dk.702, p. 7). The defendants argue this is clearly a new claim and that May should not be allowed to testify on this matter.

Ruling

It would seem that the scope of the plaintiffs' claim for failure to disclose non-recurring expenses is again an issue of contention. The court thought it had written the last words on this subject in its summary judgment order when it wrote:

> The court is satisfied that the plaintiffs' third amended complaint provides fair notice of an allegation that the footnote in the financial statements fails to disclose the actual nature of the expenses included in the

> $43.4 million figure. Moreover, the court believes the allegations at ¶ 38J(7) adequately encompass a claim that the defendants failed to disclose all non- recurring expenses, including those expenses found only on Markel's list.

969 F. Supp. at 1572. At that point, the court understood the plaintiffs' claim that KII failed to disclose its unusual and/or infrequently occurring losses as being based on the following specific allegations: 1) KII's actual disclosure at note 6 of the 1982 financial statement ($43.4 million "to reduce the carrying value of productive facilities to recoverable cost") does not comply with generally accepted accounting principles ("GAAP") because it misleads a reader by calling this a "Depreciation, depletion and amortization" expense and because it does not disclose the nature and details of items included in this $43.4 million figure; and 2) KII did not include in its disclosure all amounts of losses (items on Hall's and Markel's lists) which were unusual or infrequently occurring and that this was a violation of the GAAP warranty in ¶ 5(c) and the materiality warranty in ¶ 5(d). It appears from the latest briefs that the plaintiffs consider their accounting claim to involve more than these allegations. In the following discussion and ruling, the court hopefully will clarify for the benefit of the parties its understanding of those allegations which it believes have been properly pleaded in the pretrial order.

The defendants have raised some serious issues with the plaintiffs' accounting claim and their use of accounting experts to prove those allegations. First, Gibbs is an accountant and not an investment adviser, securities broker or investment banker. As Gibbs has testified, his understanding of what a reasonable investor would want to know is based only on an accountant's working knowledge. (Dk.669, Ex. B, p. 243). In other words, Gibbs' understanding of material information for a reasonable investor is only in the context of what an accountant would need to know in preparing financial state-

ments.[2] From what has been submitted, the record does not demonstrate that Gibbs' expertise in accounting matters qualifies him to testify on what information outside of financial statements might be material to a prudent investor. As the record now stands, Gibbs may be qualified to testify as to his understanding of materiality for a reasonable investor as an accountant would understand this standard in preparing financial statements. He is not now qualified, however, to testify generally on what information outside of financial statements would be material to a prudent investor.

Besides this issue with Gibbs' qualifications, the court shares the defendants' confusion and concern over what the plaintiffs intend as their ¶ 5(c) and ¶ 5(d) theories for their accounting claim. The warranty in ¶ 5(c) plainly, if not fully, sets out the parties' understanding of what the defendants were warranting as to their financial statements and the matters covered therein. The defendants warranted that the financial statements "fairly present the consolidated financial condition and consolidated results of operations ... at such dates and for such respective periods in accordance with generally accepted accounting principles." As for ¶ 5(d), the defendants warranted in relevant part:

> Since December 31, 1982, there has been no material change in the assets, properties, business, operations, or condition (financial or otherwise) of Buyer and its subsidiaries taken as a whole. There is no event, condition or state of facts in existence on the date hereof which is known to the Buyer or any of its officers and has not been disclosed by Buyer to the Principal Sellers and is

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[2] In his deposition, Gibbs was asked about his experience with the subject of what information would be material to a reasonable and prudent investor. (Gibbs Dep. pp. 240, 244-45). He testified that with respect to this subject he has not written any articles, he has not spoken or served on panels at seminars, and he has not been previously retained as an expert to give an opinion concerning information not found in financial statements.

> not otherwise actually known by the Principal Sellers which if fully disclosed might materially affect the valuation of the stock of the Buyer by a prudent and knowledgeable investor, excluding events, conditions and states of fact which have an effect on the oil industry in general.

In their response, the plaintiffs properly break down the first two sentences of ¶ 5(d) into two warranties: (1) that there has been no material change since December 31, 1982; and (2) that there is "no event, condition or state of facts" known by the buyers and not known by the sellers which if fully disclosed might materially affect a prudent and knowledgeable investor's valuation of the sellers' stock. The plaintiffs emphasize that their ¶ 5(d) theory on their accounting claim is limited to the second warranty. The plaintiffs, however, offer no further comments, arguments, or explanations as to what they believe on how ¶ 5(c) and ¶ 5(d) warranties function as separate theories for their accounting claim.

A review of Gibbs' report and testimony sheds some light. At the front of his report, Gibbs summarized his findings as follows:

> A) The financial statements of KII contain certain departures from GAAP, including in some instances a lack of adequate disclosures. Such departures, taken together, materially depart from the requirements of GAAP, including disclosures. Further, certain matters materially depart from GAAP on an individual basis.
>
> B) There were in addition, material facts of a financial nature about KII which were known to KII management but which were not contained in the financial statements, descriptive memoranda or elsewhere in documents furnished to the selling shareholders, and which, if disclosed, "might materially affect the valuation of the KII stock by a prudent and knowledgeable investor."

(Dk.669, Ex. A, p. 2). In his report's discussion of the plaintiffs' claim for inadequate disclosure of infrequently occurring losses, Gibbs mentions ¶ 5(d) only in the following sentence: "Further, failure to disclose these amounts is clearly contrary to the requirements of paragraph 5(d) of the 1983 Stock Purchase Agreement." (Dk.669, Ex. A, p. 27). In his deposition, Gibbs offers the most insight into his understanding and apparently that of the plaintiffs on the workings of ¶ 5(c) and ¶ 5(d) with respect to their accounting claim:

Q. Is your testimony that ¶ 5(d) of the stock purchase agreement is no different from GAAP?

MR. SCOTT: Objection to form.

A. That's not my testimony.

Q. So your testimony is that there may be matters that are not GAAP violations in your opinion as an accountant but that would still fall under the ambit of ¶ 5(d) of the stock purchase agreement, is that what you are trying to say?

A. I would--

MR. SCOTT: Go ahead answer. Objection to form.

A. I would agree with the first part of your question.

Q. What part is that?

A. The part before, is that what I'm trying to say.

....

Q. How is your opinion, vis-a-vis, GAAP which is reflected this ¶ A. on page of one of your report different from your opinion on ¶ 5(d) of the stock purchase agreement, aren't they one in the same?

A. I don't think so.

Q. Well, how are they different?

A. Well, there could very well be things that might materially affect the valuation of a reasonable and pru-

dent investor but which would not, simply just not be a part of financial statements.

Q. Focusing only on financial statements, not on information that's not contained in financial statements, insofar as financial statements are concerned, is it your testimony that the requirements of GAAP and requirements of ¶ 5(d) of the stock purchase agreement are one in the same?

A. That's not my understanding.

Q. All right, how are they different.

A. Well, as I understand it, the focus of 5(d) is not necessarily on financial statements.

Q. My question limits you to financial statements and as to the financial statements, are the two one in the same?

....

A. Well, again, my understanding of ¶ 5(d) is that its focus is not on the financial statements and so I don't know how to understand the question, how to respond to the question within the context of financial statements only.

(Dk. 669, Ex. B, pp. 242, 243, 246-47; DX-Acct 14, p. 244).

Q. Well, you make the statement on the bottom of page 26 of your report referring to this work sheet, "it appears none of the information on the attached analysis regarding 108 million dollars of matters considered by Koch Industries management to be extraordinary losses and asset write-downs in 1982 was furnished to the selling shareholders," is that correct?

A. You have read that section correct, I believe, yes.

Q. But do I understand your testimony a moment ago that you are not stating as your opinion that all 108 mil-

lion dollars of items which is the total of those lists are either unusual or infrequently occurring items within the meaning of those terms in accounting literature?

A. Not necessarily, no.

Q. Are you asserting an opinion that those items needed to be disclosed even if they were not either unusual or infrequently occurring?

A. Was your term needed to be disclosed, is that correct?

Q. Yes.

A. Yes.

Q. That is your opinion?

A. As I understood your question, yes.

Q. What's the basis, if those items are not, and we'll go through them in some detail in a moment, but if a particular item is neither unusual nor infrequently occurring within the meaning of GAAP, what is the basis for your opinion that it needed to be disclosed?

A. I guess I would have two responses to that. I don't know that I could the cover the ground for all the bases but the first that comes to mind with is conformance with ¶ 5(d) with respect to disclosure, not necessarily financial statement disclosures and the second thing that comes to mind is disclosures necessary to make the financial statements informative and useful.

Q. Well, I think I understand the first part of that answer and not the latter part. Are you saying that disclosure would be required to make the financial statements informative and useful, were you saying that that disclosure needed to be in the financial statements?

A. If it was necessary in order to make the financial statements informative and useful, yes.

Q. And it's your opinion that that would be required even if the item did not qualify as either unusual or infrequently occurring?

A. In some instances, yes.

Q. Just this catch-all, if it needed to be in there to make the financial statements informative and useful?

A. I don't know that I would refer to it as a catch-all but my terminology there is informative and useful.

(Dk.693, Ex. A, pp. 421-23).

It would appear from Gibbs' testimony that the plaintiffs do not intend to assert a ¶ 5(d) warranty violation based on no more proof than a violation of the GAAP standards required by the warranty in ¶ 5(c).[3] The plaintiffs may or may not be asserting a ¶ 5(d) warranty violation based on the defendants' failure to disclose an incremental amount of information beyond that required by GAAP for any unusual or infrequently occurring item.[4] Instead, the plaintiffs apparently intend to

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[3] If the plaintiffs, however, do intend to pursue a ¶ 5(d) warranty violation based on no more proof than a GAAP violation, the court grants the defendants' request and construes ¶ 5(d) as not incorporating the same express warranty made in ¶ 5(c). Absent this interpretation, the warranty in ¶ 5(c) would be rendered superfluous and meaningless. Consequently, proof of a GAAP violation will not suffice to prove a ¶ 5(d) warranty violation.

[4] Gibbs did testify that there may be information which might materially affect an investor's valuation of stock but which is simply not required to be part of the financial statements. The court, however, did not come across any testimony by Gibbs revealing an opinion that the materiality standard of which he has knowledge would require disclosures beyond those required by GAAP for any items which were unusual or infrequently occurring within the meaning of GAAP. If the plaintiffs, however, will pursue such a theory, the plaintiffs should be prepared to demonstrate to the court under governing Kansas contract law that the parties intended the warranty in ¶ 5(d) to impose additional disclosure requirements on financial matters that were also covered by GAAP. The court reserves its ruling on this issue for a more appropriate time, and it will not permit before that ruling an expert witness to opine that ¶ 5(d) was or was not vio-

assert a ¶ 5(d) warranty violation for those items which were neither unusual nor infrequently occurring within the meaning of GAAP but about which the defendants had additional information that might have materially affected a prudent and knowledgeable investor's valuation of the KII stock.[5]

If the plaintiffs intend to pursue an allegation that the defendants failed to disclose information on items that are neither unusual or infrequently occurring under GAAP, then the court rules that such an allegation or theory is outside the

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lated under such a theory. The court agrees that expert witness testimony may be received on the meaning of technical terms used in an agreement but that an expert opinion is otherwise inadmissible to prove the proper interpretation of the agreement. "'Absent any need to clarify or define terms of art, science, or trade, expert opinion testimony to interpret contract language is inadmissible.'" *North American Specialty Ins. Co.* v. *Myers*, 111 F.3d 1273, 1281 (6th Cir.1997) (quoting *TCP Indus., Inc.* v. *Uniroyal, Inc.*, 661 F.2d 542, 549 (6th Cir.1981) (citing in part *International Paper Co.* v. *Standard Industries, Inc.*, 389 F.2d 99, 102 n. 2 (10th Cir.1968))). The court likewise agrees that an expert witness necessarily interprets the SPA in opining that the failure to disclose certain information about unusual or infrequently occurring items constitutes a violation of the ¶ 5(d) warranty.

[5] In their response brief, the plaintiffs indicate they even may be asserting a GAAP violation for inadequate disclosures concerning items that were not unusual or infrequently occurring under GAAP:

> Plaintiffs must show that the way in which they were disclosed (or that they were not disclosed) in the financial statements failed to comply with the requirements of GAAP. Similarly, defendants' disclosures concerning these items may have violated GAAP regardless of whether they were technically "unusual" or "infrequently occurring," as those terms are specifically defined in the accounting literature. As Mr. May explained in his deposition, GAAP requires that footnotes to financial statements "be reasonably adequate for an understanding of the financial statements" and that "when there is a choice of accounting principles that can be or are material to the financial statements, that those principles be disclosed." (May Dep.190-91).

(Dk.693, pp. 7-8).

plaintiffs' accounting claim as pleaded in the pretrial order and quoted here:

> KII employed accounting methods that were designed intentionally to understate KII's earnings and assets in the financial statements. Most importantly, KII knew that the selling shareholders and their advisors would consider the apparent trend of KII's earnings as a basis for estimating the value of KII shares and KII's ability to finance the buy-out price.
>
> To diminish its apparent earnings, KII therefore employed the following accounting practice which violated GAAP and constituted breaches of both warranties in the Stock Purchase and Sale Agreement (quoted above): KII failed to disclose its unusual and/or infrequently occurring losses. KII categorized these losses as recurring expenses or depreciation, thereby artificially reducing what appeared to be KII's ordinarily recurring income.

(Dk.676, p. 8) (emphasis added). The only accounting practice alleged in this claim is the defendants' failure "to disclose its unusual and/or infrequently occurring losses." In other words, the plaintiffs specifically limit their claim to the accounting treatment of losses that are "unusual and/or infrequently occurring." The plaintiffs do not plead any claim for the accounting treatment of losses that are not "unusual and/or infrequently occurring." Nor can it be ignored that the plaintiffs chose to define these losses with accounting parlance borrowed from GAAP. Consequently, if the plaintiffs do not prove first that the loss, to which the information applies, is "unusual and/or infrequently occurring," as those terms are defined and used in GAAP, then the plaintiffs may not assert the defendants' failure to disclose such information as part of their accounting claim as pleaded in the pretrial order. Nor will the court permit any expert to testify on disclosure requirements for losses that are not "unusual and/or infrequently occurring."

As for May's testimony, the plaintiffs clarify that he will not be asked to testify on the subject of what are "unusual or infrequently occurring" losses for a business like KII, but rather he will testify as to what GAAP requires in the treatment and disclosure of losses once determined to be either "unusual or infrequently occurring." Though there may be some overlap with Gibb's testimony, May's testimony does not appear at this time to be an instance of one expert vouching for another. Because May's exposure to the facts was limited to Gibbs' report and work papers, there is a danger that his opinion may be perceived as vouching for Gibbs. The court expects that the plaintiffs will do as they have represented and focus May's testimony on disclosure requirements for unusual and/or infrequently occurring items.

McGraw's Testimony on Changed Method of Valuation and Assignment of Value to Premium for Control

The defendants take issue with the new report from the plaintiffs' expert witness on damages, Kenneth W. McGraw of Patricof & Co ("McGraw"). The defendants argue that McGraw uses a new methodology in his latest report that essentially results in a $50 million increase in damages. The defendants ask the court to prevent McGraw from changing his methodology from that used in his 1992 report. The defendants' other objection with McGraw's report is its theory the plaintiffs are entitled to a premium ranging between 35 to 45% for selling a large block of stock that resolved an ongoing dispute over voting control. The defendants argue there is no factual basis for awarding the plaintiffs a premium for control. The defendants ask the court to preclude McGraw from testifying as to any amount of damages based on a premium for control.

To show that McGraw has changed his methodology, the defendants highlight the following damage calculations found in his 1992 report. Relying on figures extracted from other expert reports, McGraw set out the following as "Asset Values:" "Underreported oil and gas reserve value--$59,600,000

or $5.22 per share," "Understated real estate values – $66,400,000 or $5.82 per share," and "Value of undisclosed refinery enhancement – $316,000,000 or $27.69 per share" for a "Total adjustment to asset value of $442,000,000 or $38.73 per share." (Dk.670, Ex. A, p. 3). In the report, McGraw discloses that he took the "asset value" for the undisclosed enhancement to KII's Pine Bend refinery from the Muse, Stancil report. McGraw's 1992 report then sets out what he labeled as "Operating Results" into three categories: "Adjustment to 1982 Net Income – $11,755,000 or $1.03 per share," "Undisclosed Non-recurring Expenses – $37,231,000 or $3.26 per share," and "Undisclosed Expansion of Pine Bend Refinery--$36,350,000 or $3.18 per share" for a "Total pro forma adjustments to operating results of $85,336,000 or $7.47 per share." (Dk.670, Ex. A, pp. 4-6). Using a price to earnings ("P/E") ratio of nine, the total adjusted value for operating results was $67 ($7.47 times 9). McGraw ended this section of his report with the following statement:

> Based upon the analysis briefly described in the foregoing, considering enhancements both to asset value and to earnings and the appropriate weighting of these elements, Patricof is of the opinion that the fair market value shortfall resulting from the misrepresentations and inadequate disclosures was approximately $58 per share, or an aggregate shortfall to selling shareholders of over $315 million. In arriving at this conclusion, Patricof relied most heavily on the higher operating results which should have been disclosed to the selling shareholders.

(Dk.670, Ex. A, p. 6). In his deposition, McGraw explained this statement as follows:

> Q. So I'm assuming that $58 is some sort of a blend between $38 and $67?
>
> B. Yes, sir.
>
> Q. How far did you blend it? Was it one-third/two-thirds?

A. Yes, two-thirds to earnings, one-third to asset based increases.

(Dk.670, Ex. B, p. 145-46).

The defendants contrast the above methodology with that used by McGraw in his new report of November 17, 1997, submitted as a result of the court's summary judgment ruling in July 11, 1997. Under the section entitled, "Methodology," McGraw opens with the following paragraph:

> Patricof's 1992 reports treated two groups of items: those affecting asset values and those reflected in operating results. Measuring the effect on value of these two groups of items entailed the use of different methodologies. Patricof considered adjustments to value from both categories, and weighted them in arriving at a conclusion. However, since the court eliminated both of the items (underreported oil and gas reserve values and understated real estate values) whose impact was solely on asset values, it is now both simpler and more appropriate to determine the financial impact of the undisclosed items through their effect on operating results. This revised report quantifies the impact on value of the two remaining disclosure items.

(Dk.670, Ex. C, p. 2). The report then separately calculates the value of the undisclosed expansion of Pine Bend Refinery and the value related to undisclosed non-recurring expenses.

For the refinery, McGraw starts with the "market multiple approach" that estimates the annual impact on earnings and then values the impact by applying a market multiple of earnings. Using data supplied by Baker & O'Brien, McGraw observes that the annual contribution to KII's net income would be $36.6 million or $3.21 per share and applying a P/E ratio of 9 produced an indicated value of $330 million or $28.93 per share. Also from Baker & O'Brien's report, McGraw takes the "value of the Pine Bend refinery to a third

party buyer both before and after the pending expansion to 155,000 barrels per day, using a discounted cash flow analysis." (Dk.670, Ex. C, p. 4). This difference in value is $239 million or $20.99 per share. In blending these two values, McGraw reports:

> Values resulting from the two approaches (the market multiple approach and Baker & O'Brien's 13 year discounted cash flow analysis) were weighted in the same proportion as in the Patricof 1992 reports, resulting in incremental value of $300 million, or $26.28 per share, related to the undisclosed Pine Bend expansion.

(Dk.670, Ex. C, p. 4) (footnote omitted).

For the non-recurring expenses, McGraw calculates the following:

> The total amount of undisclosed non-recurring expenses, net of undisclosed non-recurring income, was approximately $70.8 million. Net of taxes, this represented an addition to KII's 1982 sustainable earnings of approximately $35.4 million, or $3.10 per share. Applying a multiple of 9.0 times, the same multiple used in connection with the Pine Bend expansion, results in incremental value of $318 million, or $27.92 per share.

(Dk.670, Ex. C, p. 5). McGraw now directly adds this value with the Pine Bend value for a total of $54.20 per share or approximately $296 million. In effect, McGraw now exempts the determined value of non-recurring expenses from any weighting. If McGraw had used the same method employed in his 1992 report of giving 1/3 weight to refinery value determined by discounted cash value and 2/3 weight to the operating results value of the refinery and of non-recurring expenses, the defendants calculate that the totals would be $44.86 per share or approximately $245 million. By changing his methodology, McGraw minimizes the effect of the summary judgment ruling by over $50 million.

McGraw also opines that a premium in the range of 35 to 50% would be received in an arm's length transaction and would be a component of fair market value. Applying a premium of 35 to 45% results in a value of $73.18 to $78.60 per share, or $404 million to $434 million in aggregate value to selling shareholders. The defendants argue the record is clear that the plaintiffs did not seek a premium, did not negotiate for a premium, and did not receive a premium in the stock transaction. Thus, the defendants deny that there is any factual basis for calculating a premium for control as an element of damages.

In response, the plaintiffs say McGraw has not changed his methodology but only has recalculated the damages as required after the court's recent summary judgment ruling. Because McGraw explains his reasons and methods for recalculation, the plaintiffs argue that the defendants cannot claim any surprise. In McGraw's deposition taken in 1993, the defendants simply confirmed McGraw's weighting calculation but asked nothing about his reasons or rationale behind it. The plaintiffs remark that the defendants knew, as evidenced by their question, that McGraw used the weighting to "blend" the value of undisclosed assets with the value of undisclosed earnings. "Now defendants want the Court to assume that weighting must always be done, as a matter of law, even though defendants never asked that question at Mr. McGraw's deposition, and even though there is now nothing left to weight as a result of the Court's summary judgment decision." (Dk.692, p. 2). The plaintiffs say all asset-based values are now gone from the case, so there is nothing now to blend or weight. The plaintiffs contend the discounted cash flow method and the market multiple earnings method used to value Pine Bend are both "earnings- based methods of valuing a refinery." Finally, the plaintiffs say the proper blending of values is a matter of expert testimony and the defendants may cross examine McGraw about his reasons for weighting in 1992 and for not weighting in 1997.

The plaintiffs argue there is a factual basis for McGraw's calculation of a control premium. The plaintiffs have testified to their belief that they were entitled to receive a premium but that KII could not afford to pay one. The plaintiffs say their mistaken belief about KII's ability to pay a premium and their agreement to take the low-end of acceptable prices was the result of KII's misrepresentations about its cash flows. Thus, the plaintiffs believe they are entitled to a control premium as part of their fair market value of their stock.

Ruling

After reviewing McGraw's reports and the submitted excerpts from his deposition, the court is convinced that McGraw has not simply recalculated the damages in light of the summary judgment ruling but has actually changed his methodology for calculating damages. The court has several reasons for reaching this conclusion. First, this is not the only change that McGraw made to his report to have the net effect of minimizing the summary judgment ruling's impact on the plaintiffs' total damages.[6] Second, McGraw begins his dis-

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[6] There are at least two other changes that either actually increased the plaintiffs' damages or that suggested new elements for increasing the total damage figure. The first change was discussed at length in the court's order (Dk.683) filed February 17, 1989, which threw out the plaintiffs' latest effort to recover damages based on allegations that had never before been made under the fair market value theory. McGraw's 1997 report for the first time in this case calculated damages for the understated value of KII's disclosed earnings by increasing the P/E ratio from 7.4 to 9. Besides offering this new calculation, McGraw in his report also speculated over the facts and circumstances that might be alleged so that the plaintiffs could claim they had been misled into using a 7.4 P/E ratio in 1983 to value KII's disclosed earnings. Though he included the discussion of this new damage element and calculation under the section he entitled, "Value Related to Undisclosed Non-recurring Expenses," McGraw never explained how this damage element had anything to do with the accounting damages or why he was now just offering this new damage element only a few months before trial. The other change in McGraw's report he does explain and attribute to Baker & O'Brien's latest revised values on KII's earnings from Pine Bend Refinery. That McGraw made two changes that

cussion under the "Methodology" section of his report by describing this particular change from the weighting adjustment in 1992 to the operating results only approach in 1997. Third, but most importantly, McGraw's explanation for this change is not justified by the facts as they appear in his report.

The first two reasons give the court cause to sharpen its inquiry into McGraw's explanation for the change. McGraw explains that the change is due to the court's dismissal of the plaintiffs' claims concerning the "underreported oil and gas reserves and understated real estate values whose impact was solely on the asset values" determined in 1992. (Dk.670, Ex. C, p. 2). According to McGraw, "it is now both simpler and more appropriate to determine the financial impact of the undisclosed items through their effect on operating results." Id. Even though McGraw and the plaintiffs deny the use of asset values, McGraw's current report reflects that he still is using them in his damage calculations and that he has simply limited his weighting of asset and earning values to the refinery claim only.

The $239 million or $20.99 per share value for Pine Bend found in McGraw's 1997 report is plainly the same kind of value that McGraw called an asset value in 1992. This latest value is the result of the same discounted cash flow analysis done by Baker & O'Brien and used by McGraw in his 1992 report to determine Pine Bend's asset value. The $316 million asset value for Pine Bend found in McGraw's 1992 report corresponds to the $239 million value found in McGraw's 1997 report. The smaller value in the later report is due to the court's dismissal of the plaintiffs' claim based on expanding the refinery to 175,000 bpd.

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increased damages and offered a third way for also increasing damages when one would assume his revised report would simply adjust his calculations downward for those claims dismissed by the court leaves an unmistakable impression with this court.

Just like in 1992, McGraw again blends what he called the "asset value" in 1992 and what he now calls the discounted cash flow value. He admits in his 1997 report that he resorted to the same weighting used in his 1992 report: "Values resulting from the two approaches ... were weighted in the same proportion as in the Patricof 1992 reports." (Dk.670, Ex. C, p. 4). By weighting the asset value of Pine Bend prior to grouping the earnings-based value for Pine Bend with the earnings-based value of the undisclosed non- recurring expenses, McGraw has effectively exempted the latter earning-based value from the full weighting method used in his 1992 report. The plaintiffs' explanation that in 1997 McGraw is no longer using the asset values approach, no longer blending two values and no longer weighting different values is plainly contradicted by McGraw's own report and the record in this case.

The court also finds dubious factual support in the record for McGraw's explanation that the court's dismissal of the oil and gas reserve claims and real estate claims makes the new method "simpler and more appropriate." Under the 1992 report's calculation of asset values, these two claims constituted approximately 28% of the total asset value to be blended. The court's summary judgment ruling eliminated certain accounting claims that made up approximately 14% of the total earnings-based value to be blended. The dismissal of these two asset-value claims when considered in light of the dismissal of the other earnings-based value claims does not create a situation so remarkably different as to reasonably explain McGraw's decision to now exempt part of the earnings-based values from any weighting.

The court finds that a damages expert may not change his methodology after his deposition, after the close of discovery, and after the summary judgment ruling without offering a sound justification fully supported by the record. If this were a conventional case, the court would be more inclined to order McGraw to be deposed immediately at the plaintiffs' expense and to leave this change of methodology to the defen-

dants' cross-examination and impeachment. This case, and for that matter, this issue are not what this court would call conventional. Knowing not only this case's factual complexity, but after poring over the briefs submitted on this issue, the court seriously doubts that the jury could ever effectively understand McGraw's change in methodology or his purported reasons, let alone assess the reasonableness of both. For the impeachment of McGraw to even have a chance of being effective on this point, the door would have to be opened for the jury to hear about the claims on which the court has already granted summary judgment. For all of these reasons, the court grants defendants' motion insofar as McGraw may not change his methodology so as to limit the weighting to the refinery claim but rather he must follow his previous methodology and first group the earnings-based or market multiple value for the undisclosed expansion of Pine Bend with the earnings-based value for undisclosed non- recurring expenses and then blend or weight this total earnings-based value with the asset value or discounted cash flow value of Pine Bend.

The court denies the defendants' motion *in limine* to preclude damages calculation for a control premium. The deposition testimony cited by the plaintiffs creates enough of a factual question that the court believes this is an issue best reserved for trial.

O'Brien's Testimony on the Value of Pine Bend Refinery

The defendants move to exclude that testimony of the plaintiffs' expert witness, John O'Brien, concerning the valuation of their refinery claims. The defendants point out that O'Brien has used "a theoretical discounted cash flow analysis under which he opines that the refinery had a June 1983 value of over $1.2 billion at the 'disclosed' 130,000 bpd capacity plaintiffs allegedly believed in, and was worth $336 million more under its allegedly greater capacity." (Dk.671, p. 2). The defendants contrast O'Brien's valuations with those made by the plaintiffs' investment bankers at the time of the SPA and conclude that the "huge discrepancy between" these

values "raises obvious red flags about his [O'Brien's] methodology." Id.

The defendants complain that O'Brien's valuation "is not based on data as to the refinery's actual cash flows but rather on a series of theoretical assumptions as to the refinery's cash flows." (Dk.671, p. 5). The principal assumption challenged is that Pine Bend would have a gross refining margin ("GRM") of over $9 per barrel of processed oil that would begin in June of 1983 and continue "undiminished for 13 years." Id. The defendants attack this GRM as based in turn "on an assumed GRM for Gulf Coast refineries" and "on computer-modeled assumptions as to price/cost differentials between Pine Bend and Gulf Coast refineries and as to the particular product mixes at Pine Bend and in the Gulf Coast." Id. The defendants main contention is that O'Brien relies on these "counterfactual" assumptions which simply do not account for the actual margins of the general industry or of Pine Bend itself.

In response, the plaintiffs note that the defendants do not challenge that O'Brien is an expert on refinery valuations or that the discounted cash flow ("DCF") analysis is an "accepted method of estimating the going-concern value of refineries and other revenue-producing assets." (Dk.694, pp. 1-2). The plaintiffs observe that the defendants' attack on O'Brien's conclusions is the kind of analysis on which the Supreme Court said a district court should not engage. The plaintiffs say the investment bankers' lower valuations of Pine Bend were due to the defendants' misrepresentations and omissions. The plaintiffs argue the defendants do not levy any valid criticism with O'Brien's use of assumptions about Pine Bend's cash flow rather than Pine Bend's "actual" cash flow data. The plaintiffs say that DCF analysis is, by definition, an estimate of future cash flows produced by an assert over its anticipated life that is discounted to its present value. Consequently, the plaintiffs see the issue as not with whether

O'Brien should have estimated future cash flows but with how those future cash flows should be estimated.

The plaintiffs describe the refinery industry in the early 1980s as depressed with marginal and inefficient refineries closing and with crude oil supplies becoming heavier and demanding the modernization of refineries. The plaintiffs observe:

> Put simply, basic principles of economics dictated that refining capacity would diminish until margins returned to a level sufficient to trigger new capital investment in refining capacity. Realizing this, economists and refining industry experts at the consulting firm, Purvin & Gertz, Inc., developed a model in the early 1980s for estimating long-term average gross refining margins on the basis of the minimum average margins necessary to attract the capital investment required to meet anticipated demand for petroleum products. (citation omitted). This is the approach adopted by Mr. O'Brien. (citation omitted).
>
> Purvin & Gertz' approach to estimating future refining margins was widely accepted in the early 1980s both by oil companies and by financial institutions, and was used in numerous refinery valuation studies performed at the time. (citation omitted). This approach to predicting future refining margins continues to be viewed by industry and financial experts as fundamentally sound, and continues to be widely employed in the industry and in energy forecasts published by the United States Department of Energy. (citation omitted).

(Dk.694, pp. 12-13). The plaintiffs maintain that O'Brien's approach was widely accepted in 1983 and continues to be widely employed today and that the defendants do not argue or cite any authority to the contrary.

Ruling

The Supreme Court recently overturned the "austere" *Frye* standard of general acceptance which had required the exclusion of evidence based on scientific principles that were not so established as to gain general acceptance in that field. *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 585, 113 S. Ct. 2786, 125 L. Ed.2d 469 (1993); *Summers* v. *Missouri Pacific R.R. System*, 132 F.3d 599, 602-03 (10th Cir.1997). The Court, however, also said:

> That the *Frye* test was displaced by the Rules of Evidence does not mean, however, that the Rules themselves place no limits on the admissibility of purportedly scientific evidence. Nor is the trial judge disabled from screening such evidence. To the contrary, under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.

509 U.S. at 589, 113 S. Ct. 2786. "Thus, while the Federal Rules of Evidence allow district courts to admit a somewhat broader range of scientific testimony than would have been admissible under *Frye*, they leave in place the 'gatekeeper' role of the trial judge in screening such evidence." *General Electric Co.* v. *Joiner*, -- U.S. --, --, 118 S. Ct. 512, 517, 139 L. Ed.2d 508 (1997).

Faced with a proffer of expert testimony, the trial court " 'must determine at the outset pursuant to [Fed.R.Evid.] 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.'" *Summers*, 132 F.3d at 603 (quoting *Daubert*, 509 U.S. at 592, 113 S. Ct. 2786). In short, the trial court is to ensure that the testimony is both relevant (helpful to the trier of fact) and reliable (scientific validity). *Summers*, 132 F.3d at 603; *Duffee* v. *Murray Ohio Manufacturing Co.*, 91 F.3d 1410, 1411 (10th Cir.1996).

"[W]hen the proffered expert relies on some principle or methodology," the trial court should consider a nonexhaustive list of nondispositive factors in determining whether the reasoning or methodology is scientifically valid or reliable: (1) Can it and has it been tested?; (2) Has it been subjected to peer review and publication?; (3) Does it have a known or potential rate of error?; and (4) Has it attained general acceptance in the relevant scientific community? *Compton* v. *Subaru of America, Inc.*, 82 F.3d 1513, 1518 (10th Cir.), *cert. denied*, 519 U.S. 1042, 117 S. Ct. 611, 136 L. Ed.2d 536 (1996); *see Summers*, 132 F.3d at 603 n. 4). The focus in evaluating these factors rests upon "the principles and methodology, not on the conclusions that they generate." *Daubert*, 509 U.S. at 595, 113 S. Ct. 2786. In *Joiner*, the Supreme Court clarifies that conclusions often cannot be entirely divorced from the methodology used in arriving at them:

> But conclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered. (citation omitted).

522 U.S. at --, 118 S. Ct. at 519. As part of the pretrial evaluation, the trial court also must determine whether the expert opinion is "based on facts that enable the expert to express a reasonably accurate conclusion as opposed to conjecture or speculation [but] absolute certainty is not required." *Kieffer* v. *Weston Land, Inc.*, 90 F.3d 1496, 1499 (10th Cir.1996) (quoting *Jones* v. *Otis Elevator Co.*, 861 F.2d 655, 662 (11th Cir.1988)).

Because the discounted cash flow method for valuing income-producing assets is generally accepted, if not well-established, in the finance world, the defendants' only

serious challenge to O'Brien's valuation is with the assumptions he used in his discount cash flow analysis. Though undoubtedly skewed to yield a high valuation, O'Brien's assumptions when considered in light of the record supplied by the plaintiffs are not what this court would consider to be "counterfactual," "unsupportable" or "unreasonable" or would reject as nothing more than conjecture and speculation. That O'Brien's assumed gross refining margin is higher than the actual margins experienced during the years of 1981 through 1983 does not prove that the assumed margin is unsupportable.[7]

O'Brien took his assumed margin of $4 for Gulf Coast refineries from a certain project in 1982 and 1983 done by Purvin & Gertz, a world-wide consulting firm specializing in energy and chemical industries, in which they had "estimated that a projected long term gross refining margin of $4 per barrel would be required to encourage upgrading investments and produce a balanced market." (Dk.694, Ex. P, pp. 322-23). O'Brien testified that this GRM was actually used in one or more valuation reports that he actually did or assisted in 1982 or 1983. Id. at 323-24. O'Brien further testified that he did a historical study for the nine-year period from 1974 to 1982 that confirmed the general accuracy of his assumed GRM. Id. at 328-30.

In arriving at the $9 GRM for Pine Bend, O'Brien used computer models with actual data produced during discovery to measure the differential between Gulf Coast margins and Pine Bend's margins. O'Brien's report even refers to documents from the early 1980s prepared by Koch Refining Company in which they estimate Pine Bend's advantage "over what was termed 'the break-even Gulf Coast refiner' was usually in the range of $5 to $6 per barrel." (Dk.694, Ex. A,

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[7] The defendants offer no authority that valuations of refineries or income-producing assets should be based principally on actual data available for the three preceding years.

p. 38). Finally, the record does not show that O'Brien assumed that Pine Bend would achieve a $9 GRM every year. Rather, he will testify that this would be the average GRM obtained by Pine Bend over a thirteen-year period.

At this time, the court is satisfied that the assumptions used by O'Brien in his discount cash flow analysis are based on methodology and calculations which clear the minimum threshold of financial validity. The defendants' criticisms with O'Brien's assumptions appear to be weaknesses in the underpinnings of his opinion that go to its weight not its admissibility. *Compton*, 82 F.3d at 1518. The court denies the defendants' motion *in limine*.

IT IS THEREFORE ORDERED that the plaintiffs' motion *in limine* (Dk.663) to exclude post 1985 lawsuits is granted in part and all counsel and parties are ordered not to refer to the following eight cases:

> *In re Ann A. Linn*, filed February 3, 1988, in the United States Bankruptcy Court for the Western District of Oklahoma, Case No. 88-00711-TS.
>
> *In re James P. Linn, Debtor*, filed February 3, 1988, in the United States Bankruptcy Court for the Western District of Oklahoma, Case No. 88-00712-TS.
>
> *International Oil Resources, Inc.* v. *Michael P. Aquilina, et al./Michael P. Aquilina* v. *William I. Koch, et al.*, filed March 3, 1988, in the United States District Court for the Central District of California, Case No. CV 88-01168 PAR (GXKx).
>
> *Ann A. Linn* v. *James P. Linn*, decree of divorce filed January 5, 1989, in the District Court of Oklahoma County, Oklahoma, Case No. FD-88-8451.
>
> *United States of America, ex rel. The Precision Company* v. *Koch Industries, Inc., et al.*, ("*Precision I*"), filed May 25, 1989, in the United States District Court for the Northern District of Oklahoma, Civil Action No. 89-C- 437-C.

United States of America, ex rel. The Precision Company v. *Koch Industries, Inc., et al.*, ("*Precision II*"), filed September 30, 1991, in the United States District Court for the Northern District of Oklahoma, Civil Action No. 91-C- 763-B.

Louis Howard Andres Cox v. *William I. Koch, et al.*, filed November 21, 1991, in the United States District Court for the Western District of Oklahoma, Case No. CIV-91-1921-A.

Marjorie Simmons Gray, et al. v. *Louis Howard Andres Cox*, filed November 21, 1994, in Probate Court, Harris County, Texas Case No. 271283.

The court denies the plaintiffs' motion *in limine* to exclude evidence and references to the other seven lawsuits named in the plaintiffs' motion and evidence suggesting that William Koch is engaged in an "ongoing vendetta" against his brothers, Charles and David Koch;

IT IS FURTHER ORDERED that the plaintiffs' motion *in limine* (Dk.664) is granted in part and all parties and counsel are precluded from presenting evidence or referring to:

1) the parties' personal lives or lifestyles, including their marital or other personal relationships, recreational interests, hobbies, passions, political or religious beliefs or unrelated financial endeavors;

2) William Koch's refusal to pay Goldman Sachs its full contract fee for its work in *Koch I* and refusal to pay Jim Linn a promised settlement fee for his work in settling Koch I;

3) Any investigations or surveillance of the personal residences and offices of the parties, their counsel and agents;

and the plaintiffs' motion *in limine* (Dk.664) is denied as to evidence that the focus of the plaintiff William Koch's

"psychiatric treatment" and "psychotherapy" was his troubled relations with his brothers;

IT IS FURTHER ORDERED that the plaintiffs' motion *in limine* (Dk.665) is granted and all parties and counsel are precluded from presenting evidence or referring to the comments, findings, or rulings made by this court or any other court concerning the plaintiffs, the defendants or any of the claims in this case or any prior or pending litigation involving these parties;

IT IS FURTHER ORDERED that the plaintiffs' motion *in limine* (Dk.666) is granted to the extent that there will be no references or evidence concerning the dismissal or withdrawal of any claim or defense in this case but this does not preclude the defendants from introducing evidence that William Koch began investigating KII shortly after the SPA, that William Koch sent a pre-suit demand letter, and that the claims going to trial were not part of the case when it was filed;

IT IS FURTHER ORDERED that the plaintiffs' motion *in limine* (Dk.667) is granted and all parties and counsel are precluded from presenting evidence or referring to the plaintiffs' counsel or experts who have withdrawn or been replaced during this litigation, except for showing witness bias through evidence of what prior counsel may have instructed and paid expert witnesses;

IT IS FURTHER ORDERED that the defendants' motion *in limine* (Dk.668) is granted in part and all parties and counsel are precluded from presenting evidence or referring to the document destruction allegations or evidence found in or related to the Oklahoma litigation, and the defendants' motion is denied as to the gap in documents produced by the defendants concerning the Williams Pipeline reversal negotiations and/or agreement and as to the fact that Peat Marwick destroyed its work papers for the audits in 1981 and 1982;

IT IS FURTHER ORDERED that the defendants' motion *in limine* (Dk.669) is granted in part and the plaintiffs are not to allege or offer an expert opinion that ¶ 5(d) was violated based on no more proof than a GAAP violation; are not to offer an expert opinion that ¶ 5(d) was violated based on the defendants' failure to disclose an incremental amount of information beyond that required by GAAP for any unusual or infrequently occurring item until the court finds that the plaintiffs have demonstrated under governing Kansas contract law that the parties intended the warranty in ¶ 5(d) to impose additional disclosure requirements on financial matters that were also covered by GAAP; and are not to allege or offer an expert opinion that ¶ 5(c) or ¶ 5(d) was violated based on the defendants failed to disclose information on items that are neither unusual or infrequently occurring under GAAP; and the defendants' motion *in limine* (Dk.669) to exclude the entirety of Alan May's testimony is denied upon the plaintiffs' representation that the focus of May's testimony will be on the disclosure requirements for unusual and/or infrequently occurring items;

IT IS FURTHER ORDERED that the defendants' motion *in limine* (Dk.670) is granted insofar as McGraw may not change his methodology so as to limit the weighting to the refinery claim but rather he must follow his previous methodology and first group the earnings-based or market multiple value for the undisclosed expansion of Pine Bend with the earnings-based value for undisclosed non-recurring expenses and then blend or weight this total earnings-based value with the asset value or discounted cash flow value of Pine Bend; and is denied on the request to exclude McGraw's damage calculations for a control premium;

IT IS FURTHER ORDERED that the defendants' motion *in limine* (Dk.670) to exclude John O'Brien's opinion testimony on the value of the Pine Bend Refinery is denied.

APPENDIX C

6 F.Supp.2d 1207

United States District Court,
D. Kansas.

William I. KOCH, et al., Plaintiffs,

v.

KOCH INDUSTRIES, INC., et al., Defendants.

No. 85-1636-SAC.

April 3, 1998.

Clifford L. Malone, Adams, Jones, Robinson & Malone, Wichita, KS, Thomas E. Wright, Wright, Henson, Somers, Sebelius, Clark & Baker, L.L.P., Topeka, KS, Harry L. Najim, Najim Law Offices, Wichita, KS, John T Hickey, Jr., Alex Dimitrief, Kirkland & Ellis, Chicago, IL, Joseph F. Ryan, Lyne, Woodworth & Evarts, Boston, MA, Abraham D. Sofaer, John M. Townsend, Norman C. Kleinberg, Michael E. Salzman, Hughes, Hubbard & Reed, Washington, DC, Jerome G. Shapiro, Robert J. Sisk, Steven A. Hammond, Nicolas Swerdloff, Hughes, Hubbard & Reed, New York City, Fred H. Bartlit, Jr., Bartlit, Beck, Herman, Palenchar & Scott, Chicago, IL, Donald E. Scott, Ellen A. Cirangle, Bartlit, Beck, Herman, Palenchar & Scott, Denver, CO, for William I. Koch, Oxbow Energy, Inc., Springfield Creek Art Foundation, Inc., Northern Trust Co.

Clifford L. Malone, Adams, Jones, Robinson & Malone, Wichita, KS, Harry L. Najim, Najim Law Offices, Wichita, KS, Gregory S.C. Huffman, Frank L. Hill, L. James Ber-

glund, II, Thompson & Knoght, Dallas, TX, for L.B. Simmons Energy Inc., Gay A. Roane, Ann Alspaugh, Marjorie Simmons Gray, Marjorie L. Simmons, Paul Anthony Andres Cox, Holly A. Andres Cox Farabee.

Clifford L. Malone, Adams, Jones, Robinson & Malone, Wichita, KS, Harry L. Najim, Najim Law Offices, Wichita, KS, Russell E. Brooks, Milbank, Tweed, Hadley & McCloy, New York City, for United States Trust Co. of New York, Frederick R. Koch.

Stephen M. Joseph, Redmond & Nazar, L.L.P., Wichita, KS, Michael Paul Kirschner, Lee & Kirschner, P.L.L.C., Oklahoma, City, OK, for Louis Howard Andres Cox, Nationsbank N.A.

James M. Armstrong, Robert L. Howard, Timothy B. Mustaine, Foulston & Siefkin L.L.P., Wichita, KS, Donald L. Cordes, Wichita, KS, for Koch Industries, Inc., Charles G. Koch.

James M. Armstrong, Robert L. Howard, Timothy B. Mustaine, Foulston & Siefkin L.L.P., Wichita, KS, for Sterling V. Varner, David H. Koch, Donald L. Cordes, Thomas M. Carey.

Michael W. Merriam, Gehrt & Roberts, Chartered, for Kansas Press Association, Kansas Association of Broadcasters, Wichita Eagle-Beacon, Topeka Capital-Journal, WIBW-TV, Kansas City Star Company, Wichita Business Journal, Harris Enterprises, Inc., Koch Crime Comm.

MEMORANDUM AND ORDER

CROW, Senior District Judge.

The case comes before the court on the plaintiffs' motion for reconsideration and modification of the court's rulings *in limine* on (1) post-1985 lawsuits and (2) consultations with health professionals and for clarification of certain aspects of those rulings. (Dk.743). The defendants have filed their response opposing the motion to reconsider. (Dk.753). The

court conducted a hearing on April 2, 1998, at 3:00 p.m. at which counsel for the plaintiff William Koch, William Koch, and counsel for the defendants attended in person and argued their positions. Counsel for the other plaintiffs appeared by telephone.

STANDARDS GOVERNING MOTION TO RECONSIDER

As the rules of this court provide, "[a] motion to reconsider shall be based on (1) an intervening changed in controlling law, (2) availability of new evidence, or (3) the need to correct clear error or prevent manifest injustice." D.Kan. Rule 7.3. The application of this rule obviously is subject to other orders of the court and to other standards that govern such rulings.

In its order deciding the *in limine* motions (Dk.719, pp. 3-4), the court indicated that its denial of a motion was subject to reconsideration at trial. This use of the contemporaneous objection rule gives the trial judge the "opportunity to 'reconsider his *in limine* ruling with the benefit of having been witness to the unfolding events at trial.'" *Marceaux* v. *Conoco, Inc.*, 124 F.3d 730, 734 (5th Cir.1997) (quoting *United States* v. *Graves*, 5 F.3d 1546, 1552 (5th Cir.1993)). In fact, the court may even have "a duty to reconsider" when evidence at trial amounts to "positive proof that its prior ruling was erroneous." *Guillory* v. *Domtar Industries Inc.*, 95 F.3d 1320, 1332 (5th Cir.1996).

Because the plaintiffs have filed their motion before trial, the court believes the general standards governing motions to reconsider apply now. *See, e.g., Burger* v. *Mays*, 176 F.R.D. 153, 155 (E.D.Pa.1997). A court's rulings "are not intended as first drafts, subject to revision and reconsideration at a litigant's pleasure." *Quaker Alloy Casting* v. *Gulfco Industries, Inc.*, 123 F.R.D. 282, 288 (N.D.Ill.1988). A motion to reconsider is appropriate if the court has obviously misapprehended a party's position, the facts, or applicable law, or if the party produces new evidence that could not have been obtained

through the exercise of due diligence. *Comeau* v. *Rupp*, 810 F. Supp. 1172, 1175 (D.Kan.1992); *see Refrigeration Sales Co. Inc.* v. *Mitchell-Jackson, Inc.*, 605 F. Supp. 6, 7 (N.D.Ill.1983), *aff'd*, 770 F.2d 98 (7th Cir.1985). A motion to reconsider is not appropriate if the movant only wants the court to revisit issues already addressed or to hear new arguments or supporting facts that could have been presented originally. *Comeau* v. *Rupp*, 810 F. Supp. at 1175.

PRIOR *IN LIMINE* ORDER

The court on March 20, 1998, filed its rulings on the *in limine* motions that were pending. On the plaintiffs' motion to "prohibit any references at trial and exclude any evidence offered by defendants concerning other lawsuits involving the plaintiffs that were initiated after June 7, 1985," (Dk.663, p. 1), the court denied the motion as to seven of the fifteen named lawsuits and denied the plaintiffs' request to exclude evidence suggesting that William Koch is engaged in an "ongoing vendetta" against his brothers, Charles and David Koch. (Dk.719, pp. 56-57). Based on what the defendants had filed and on its own experience from handling this case for over a decade, the court observed that "William Koch's animosity for Charles and David, the intensity of those feelings, and the actions that reveal those feelings are central to the defendants' case in several regards." (Dk.719, p. 13) (italics added).

On the plaintiffs' motion to exclude evidence of medical consultations for psychological or psychiatric purposes, (Dk.664, p. 2), the court ruled that the evidence has probative value, that the balancing of Rule 403 concerns could not be completed without hearing the specific evidence, that the evidence would not be excluded at this time because of its assumed sensitive nature, and that the plaintiffs had not carried their burden in proving this motion. (Dk.719, p. 17).

POST-1985 LAWSUITS

Argument

The plaintiffs contend that the court in its ruling gave the issue of family relationships more significance than ever before argued by the parties and apparently elevated its status beyond the need to balance competing Rule 403 concerns. The plaintiffs deny the importance of this issue asserting its absence from the pleadings and the pretrial order. The plaintiffs describe the defendants' prior use of this issue as a "peripheral matter" argued in passing in the preface and conclusion of their briefs. The plaintiffs argue unfairness in that this issue was not the subject of discovery, was never disclosed to be a matter of central importance, and was outside the 1981-1985 discovery time period imposed against the plaintiffs. In their brief, the plaintiffs maintain the emotionally-charged evidence connected with this issue is inflammatory, prejudicial, and cumulative of other admissible evidence on bias. The plaintiffs repeatedly mention the perceived unfair prejudice from the evidence that William and Frederick Koch named their mother as a defendant in a lawsuit against their brothers.

Ruling

As with almost every evidentiary dispute involving Rules 401 through 403, one side promotes the evidence as particularly relevant and critical to its case, while the other side disparages the evidence as peripherally relevant and prejudicial. This is why most courts, facing this situation, will wait to see how the evidence and events unfold at trial before ruling on admissibility. This is what the court has done here, and the points reiterated by the plaintiffs do not persuade the court to do otherwise.

The court will address briefly those arguments that the plaintiffs have said are the "heart of their position." The court has neither the time nor the inclination to pore over the prior

pleadings[1] and extract all references to family relations. Nor should there be a need for the court to quote from its prior discovery orders any observations about the parties' apparent motives. A plain reading of those matters along with a detailed review of this case's procedural history would leave most with the impression that the litigation is occurring in the shadows of issues that are much larger and more personal for the parties. The plaintiffs have no real basis for alleging surprise over the defendants' desire to present relevant evidence on this issue and to argue its importance to the claims and defenses in this case.

The plaintiffs' arguments for a level playing field are misdirected. The court's prior rulings on the scope of the pretrial order focused not on whether the plaintiffs mentioned certain evidence there but on whether the plaintiffs had actually alleged certain claims of fraud and elements of damages. Other than a listing of the witness and exhibit, the pretrial order does not require the parties to give detailed accounts of all evidence to be used in proving or refuting the claims, damages and defenses in the case. For that matter, the issue of witness credibility exists in every trial, and the admissibility

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[1] The court will provide one example. In their motion for summary judgment, the defendants expressly mentioned this issue as part of their position in this litigation:

> Defendants' position in this litigation is that the *Blakesley* [v. *Johnson*, 227 Kan. 495, 608 P.2d 908 (1980)] fiduciary duties did not exist, or were severely attenuated, because of the complete absence of trust and confidence between plaintiffs and defendants, as reflected, for example, in the fact that the stock sale at issue was made to settle a lawsuit that itself reflected a bitter contest for corporate control and considerable personal enmity. For purposes of this summary judgment only, however, defendants do not argue that the *Blakesley* is inapplicable.

(Dk. 581, p. 17 n. 3) (bolding added). The court referred to this position in its summary judgment order. *Koch* v. *Koch Industries, Inc.*, 969 F. Supp. 1460, 1491 n. 11 (D.Kan.1997).

of evidence on that issue does not depend on the parties having mentioned it in the pretrial order. As for the time parameters set in the magistrate judge's discovery orders,[2] the

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[2] Until the parties demonstrate otherwise, the court stands by its statement at the hearing that it is unaware of any order where it has been directly asked to review and did review the 1981-1985 time parameters imposed by the magistrate judge for discovery of certain financial and business records of KII. The plaintiffs' counsel at the hearing offered that the district court did review those time parameters in its order filed October 24, 1991. The court's order filed that date (Dk. 386, 1991 WL 241814) addresses no arguments specifically challenging the propriety of those time parameters. The magistrate judge appears to have first adopted this time-period restriction in his order filed January 6, 1990, (Dk.241), concerning discovery from the banks lending KII the money needed to buyout the plaintiffs. In relevant part, the magistrate judge noted:

> Allowing the plaintiffs to reach back to January of 1981 allows an adequate period of time, prior to the June, 1983 Agreement, (and prior to the first action filing date in October 1982) to determine the full extent of the transactions between Koch and the lending banks to accomplish the stock buyout. This time extends further back in time than the previous discovery period of January, 1983, requested by plaintiffs, and it appears more than adequate to allow plaintiffs to discover all documents and records pertaining to any discrepancy in values reflected by the financial statements and documents, on the one hand, and the values relied on in connection with the stock purchase agreement, on the other.
>
> Similarly, a cut off date of December 31, 1985 appears more than reasonable.... If what is discovered pertaining to the period from January 1, 1981 to December 31, 1985, indicates the period should be enlarged, the court has the power and discretion to do so. Likewise, if the beginning date of the period of discovery needs to be rolled back that can also be done if the facts then indicate it is appropriate to do so.

(Dk.241, pp. 4-5). The plaintiffs never sought review of this order but did file a motion for clarification on July 31, 1990. (Dk.243). In that motion, the plaintiffs did not contest the time parameters, and instead, incorporated them in their requested language to the magistrate judge. The magistrate judge issued his clarifying order on November 30, 1990, which became the subject of a plaintiffs' motion for review.

plaintiffs have not demonstrated any prejudice or unfairness on this issue as a result of that discovery limitation.

The plaintiffs are mistaken if they believe the court has not balanced the competing Rule 403 concerns in ruling on their motion or if they believe the court will not balance those concerns at trial before admitting any evidence to which a Rule 403 objection is made. The court's order indicates it considered the prejudice if the evidence were "used to paint William Koch as a 'litigious character' who files lawsuits devoid of merit." The court observed that a limiting instruction may be effective in curing or, at least, minimizing the plaintiffs' concerns over prejudice. The court's concerns over prejudice and delay were also addressed in its footnote suggesting that the parties can introduce this evidence for its limited purpose without having it explode into mini-trials of the other lawsuits.

The plaintiffs draw the court's attention in particular to the lawsuit naming their mother as a defendant. "A majority of potential jurors in Kansas no doubt believe that it is never appropriate to sue one's own mother, and will harbor deep mistrust for anyone who would do that." (Dk.743, p. 6). The potential jurors' responses to the question, "Do you believe it is ever appropriate to sue a family member?," asked in the

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The district court's order filed October 24, 1991, (Dk. 386, 1991 WL 241814), decided the plaintiffs' motion for review (Dk.300) of the magistrate judges' orders filed November 30, 1990. (Dks. 295, 296, and 297). In that motion and supporting memorandum, the plaintiffs made several sweeping statements about the magistrate judge's discovery orders, but they focused their challenges on the subject matter limits that had been imposed and that were based on the issues, assets, or claims. The plaintiffs never specifically argued in their motion that the time parameters were an unreasonable restriction on discovery. Believing that the plaintiffs' position in the motion for review was consistent with their position in the motion for clarification, the district court did not consider there to be any objection to the time parameters and did not address any in its order of October 24, 1991.

questionnaire suggest the plaintiffs may be overstating the prejudice. "Evidence is not unfairly prejudicial simply because it is damaging to an opponent's case. Rather, the evidence must have 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.' " *United States* v. *Martinez*, 938 F.2d 1078, 1082 (10th Cir.1991) (quoting Fed.R.Evid. 403 advisory committee's note) (internal citations omitted). The court is confident that the plaintiffs' able counsel will be able to address and minimize whatever potential for unfair prejudice may exist in the jury pool over this evidence and to alert the court's attention when they believe this evidence is being used unfairly at trial.

Finally, the court would like to clarify its *in limine* order on this subject and elaborate on what is said at footnote one. The court does not consider its comments in footnote one to create any exception to its other ruling "that parties and counsel are precluded from presenting evidence or referring to the comments, findings, or rulings made by this court or any other court concerning the plaintiffs, the defendants or any of the claims in this case or any prior or pending litigation involving these parties." (Dk.719, pp. 57-58). Footnote one was simply the court's expressed "hope" that it would not be forced to modify this ruling because a side opened the door for a presentation of evidence from those cases or for a discussion of the court's rulings, findings or comments in those cases. The court believes that its rulings on the motions *in limine* are not inconsistent, that both sides can fairly abide by both rulings, and that any need to modify the order is really a matter of what unfolds at trial.

The court offers the following directions on what it expects from both sides and what the parties can expect from the court with respect to the handling of this evidence. The court desires as much as the parties to keep the jury from being confused or distracted by other litigation. The court cannot stress enough that this evidence is being offered for a

limited purpose: to demonstrate the strained relations between William Koch and his brothers, Charles and David Koch.[3] It is not to show that William Koch likes to file lawsuits, that William Koch files lawsuits devoid of merit, or that William Koch lacked proper feelings and consideration for his mother. To rebut the limited purpose for which this evidence is offered, the plaintiffs, in particular William Koch, should have the opportunity to discuss and relate his reasons for filing the lawsuits or for taking the position that led to the filing of the lawsuits. The court believes that the plaintiffs can effectively explain their reasons for filing or defending the lawsuits without introducing actual evidence that was used in those lawsuits or that has no other purpose than to prove the factual or legal merit behind their reasons for the lawsuits and without referring to any comments, findings, or rulings made by any court in that lawsuit or concerning that lawsuit. The defendants, in turn, are limited in explaining their position in those lawsuits without introducing actual evidence that was used in those lawsuits or that has no other purpose than to prove the factual or legal merit behind their reasons for the lawsuits and without referring to any comments, findings, or rulings made by any court in that lawsuit or concerning that lawsuit. Though such evidence and rulings may have some probative value in discerning the motives of the parties involved in a lawsuit, the court fully appreciates that the same is a slippery slope with the likely bottom being full-blown mini-trials of the other lawsuits. Consequently, the court believes Rule 403 concerns will in most instances cut off inquiry beyond that outlined above. In sum, the court does not retreat from its earlier ruling for the all of the reasons stated above.

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[3] Consistent with this limited purpose, the defendant should have no need to give more than a brief description of the lawsuit which informs the jury of the parties, the filing date, the nature of the suit, and the relief sought.

CONSULTATIONS WITH MENTAL HEALTH PROFESSIONALS

Argument

In support of their motion to reconsider this ruling, the plaintiffs offer an excerpt from David Koch's deposition and an affidavit from William Koch. From this evidence, the plaintiffs argue that David Koch visited with Dr. Louis Chase, that Dr. Louis Chase was never William Koch's psychiatrist, and that such evidence is unfairly prejudicial. The defendants in response throw out several assumptions for why David Koch's testimony may be admissible and also offer Charles Koch's statement that "William told Charles that his psychiatrist had advised him that he had to 'stand up to Charles, he had to be a man.'" (Dk., p. 5).

Ruling

The court modifies its earlier ruling as to David Koch's testimony[4] concerning his visit with a psychiatrist during which the psychiatrist made certain comments about William Koch. The court takes this motion under advisement, and neither side shall refer to this evidence in any statement, argument, or testimony before the jury without first approaching the bench and having its admissibility determined by the court. The court denies the plaintiffs' motion to reconsider as it concerns Charles Koch's testimony about what William Koch had told him.

PLAINTIFFS' SUPPLEMENTAL OPENING ARGUMENTS

Certain plaintiffs request the opportunity to present a short opening statement of their own in which to briefly describe facts unique to their respective claims. See Plaintiff Frederick R. Koch's Memorandum in Support of Application to Present

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[4] The plaintiffs attached this deposition testimony of David Koch as exhibit B to their motion for reconsideration.

Supplemental Opening Statement (Dk.751); Simmons Plaintiffs' Statement (Dk.749). The defendants do not oppose the requests of those parties, "provided that [their separate opening] is limited to the matters set forth in [their briefs], provided that there is an adequate evidentiary basis for the statements made, and provided that the total time for the opening statements of all plaintiffs does not exceed the 2 hours allotted by the Court." (Dk.754).

The court grants the request of plaintiffs who have filed briefs to make an opening statement describing facts unique to their respective claims as stated in the pretrial order. Such opening statement should be confined to facts and subject matter proffered in that party's brief requesting the opportunity to make an opening statement. Obviously any opening statement by any party should be confined to a statement of the issues in the case and the evidence that party intends to offer and which that party believes in good faith will be available and admissible at trial. At the status conference, it was agreed that both sides would have two hours for their opening statements and the plaintiffs shall divide as they wish their allotted two hours.

The Simmons Plaintiffs' brief goes beyond merely requesting an opportunity to make their own opening statement. The Simmons Plaintiffs also request the opportunity to be heard during *voir dire*, examination of witnesses and closing argument. To the extent that the Simmons Plaintiffs are asking the court to reconsider the limitations imposed in paragraph 14 of the pretrial order, or the limitations orally announced by the court at the March 27, 1998, status conference,[5] that request is denied as untimely.

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[5] At the March 27, 1998, status conference, the court indicated that it expected lead counsel to monitor the other counsel on their side to determine if supplemental, non-cumulative comments or questions are appropriate and necessary. The court also indicated that if it was anticipated that more than one counsel would be involved in the examination of a witness, that

IT IS THEREFORE ORDERED that the plaintiffs' motion to reconsider (Dk.743) the court's *in limine* ruling on post-1985 lawsuits is denied and that the court's order filed March 20, 1998 (Dk.719) is clarified as stated above;

IT IS FURTHER ORDERED that the plaintiffs' motion to reconsider (Dk.743) the court's *in limine* ruling on the plaintiffs' consultations with mental health professionals is granted in part and denied in part.

IT IS FURTHER ORDERED that counsel for Frederick R. Koch and counsel for the Simmons plaintiffs may give opening statements under the limitations set forth above.

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the parties should provide to the court and the other side at least 24-hour written notice of the witnesses, the additional counsel's name, and a brief proffer why that party's position is materially different from other parties on that side of the case.

APPENDIX D

1998 WL 975598

United States District Court, D. Kansas.

William I. KOCH, et al., Plaintiffs,

v.

KOCH INDUSTRIES, INC., et al., Defendants.

No. 85-1636-SAC.

May 6, 1998.

Clifford L. Malone, Adams, Jones, Robinson & Malone, Wichita, KS, Thomas E. Wright, Wright, Henson, Somers, Sebelius, Clark & Baker, LLP, Topeka, KS, Harry L. Najim, Najim Law Offices, Wichita, KS, John T Hickey, Jr, Alex Dimitrief, Kirkland & Ellis, Chicago, IL, Joseph F Ryan, Lyne, Woodworth & Evarts, Boston, MA, Fred H Bartlit, Jr, Bartlit, Beck, Herman, Palenchar & Scott, Chicago, IL, Donald E Scott, Ellen A Cirangle, Bartlit, Beck, Herman, Palenchar & Scott, Denver, CO, for William I Koch, plaintiff.

Clifford L. Malone, Thomas E. Wright, Harry L. Najim, John T Hickey, Jr, Alex Dimitrief, Joseph F Ryan, Fred H Bartlit, Jr, Donald E Scott, Ellen A Cirangle, (See above), for Oxbow Energy Inc, plaintiff.

Clifford L. Malone, Harry L. Najim (See above) for LB Simmons Energy Inc dba Rocket Oil Company, plaintiff.

Clifford L. Malone, Harry L. Najim (See above), Russell E Brooks, Milbank, Tweed, Hadley & McCloy, New York City, for United States Trust Company of New York, as Trustee, plaintiff.

Clifford L. Malone, Thomas E. Wright, Harry L. Najim, John T Hickey, Jr, Alex Dimitrief, Joseph F Ryan, Fred H Bartlit, Jr, Donald E Scott, Ellen A Cirangle, (See above), for Spring Creek Art Foundation Inc, plaintiff.

Clifford L. Malone, Harry L. Najim (See above) for Gay A Roane, plaintiff.

Clifford L. Malone, Harry L. Najim (See above) for Ann Alspaugh, plaintiff.

Clifford L. Malone, Harry L. Najim (See above) for Marjorie Simmons Gray, as Trustee, plaintiff.

Clifford L. Malone, Thomas E. Wright, Harry L. Najim, John T Hickey, Jr, Alex Dimitrief, Joseph F Ryan, Fred H Bartlit, Jr, Donald E Scott, Ellen A Cirangle, (See above), for Northern Trust Company, as Trustee, plaintiff.

Clifford L. Malone, Harry L. Najim (See above) for Marjorie L Simmons, as Trustee, plaintiff.

Michael Paul Kirschner, Lee & Kirschner, P.L.L.C., Oklahoma City, OK, for Louis Howard Andres Cox, plaintiff.

Clifford L. Malone, Harry L. Najim, Gregory SC Huffman, Michael Paul Kirschner, (See above), for Paul Anthony Andres Cox, plaintiff.

James M. Armstrong, Robert L. Howard, Timothy B. Mustaine, Foulston & Siefkin L.L.P., Wichita, KS, Donald L. Cordes, Koch Industries, Inc., Wichita, KS, for Koch Industries Inc, defendant.

James M. Armstrong, Robert L. Howard, Timothy .B. Mustaine, Donald L. Cordes, (See above), for Charles G Koch, defendant.

James M. Armstrong, Robert L. Howard, (See above), for Sterling V Varner, defendant.

James M. Armstrong, Robert L. Howard, (See above), for David H Koch, defendant.

James M. Armstrong, Robert L. Howard, (See above), for Donald L Cordes, defendant.

James M. Armstrong, Robert L. Howard, (See above), for Thomas M Carey, defendant.

Michael W. Merriam, Gehrt & Roberts, Chartered, Topeka, KS, for Kansas Press Association, movant.

Michael W. Merriam, (See above), for Kansas Association of Broadcasters, movant.

Michael W. Merriam, (See above), for Wichita Eagle-Beacon, movant.

Michael W. Merriam, (See above), for Topeka Capital-Journal, movant.

Michael W. Merriam, (See above), for WIBW-TV, movant.

Michael W. Merriam, (See above), for Kansas City Star Company, the movant.Michael W. Merriam, (See above), for Wichita Business Journal, movant.

Michael W. Merriam, (See above), for Harris Enterprises, Inc., movant.

Daniel R. Lykins, Bryan, Lykins & Hejtmanek, P.A., Topeka, KS, for Koch Crime Comm, movant.

MEMORANDUM AND ORDER

This case has been pending for approximately thirteen years. This court has shepherded this case since its inception.

Two of the plaintiffs,[1] William Koch and Frederick Koch, are the brothers of two of the defendants, Charles Koch and David Koch. Koch Industries, Inc., another defendant, is essentially the company founded by the father of the four brothers, Fred Koch. Charles Koch has acted as chief executive officer of Koch Industries since the death of Fred Koch in 1967.

The plaintiffs' claims in this case arise out of the sale of their minority share of Koch Industries stock in June of 1983.[2] In exchange for their stock, the plaintiffs received approximately $1.1 billion dollars plus a pro rata share of certain oil interests. At its core, the plaintiffs claim that the amount they received for their stock was too low. The plaintiffs assert claims against the defendants for violation of federal securities law, breach of contract (breach of warranty), fraud, and breach of fiduciary duty. The plaintiffs seek compensatory and exemplary damages in excess of a billion dollars. The defendants deny liability on all of the plaintiffs' claims.

On March 20, 1998, prior to the commencement of trial, the court entered a memorandum and order addressing several motions *in limine*. *See Koch v. Koch Industries, Inc.*, 1998 WL ___ (D.Kan. March 20, 1998). On April 3, 1998, the court entered a memorandum and order explaining, clarifying and modifying in part its March 20, 1998, memorandum and order. *See Koch v. Koch Industries, Inc.*, 1998 WL ___ (D.Kan. April 3, 1998). Trial in this case commenced on

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[1] Most of the other plaintiffs are cousins of the Koch brothers or are trusts established on their behalf. For simplicity, throughout this case these persons, members of the Simmons family, have generally been referred to collectively as "the Simmons plaintiffs."

[2] A more complete history of this case can be gleaned from the lengthy memorandum and order entered by this court last summer which granted in part and denied in part the defendants' motion for summary judgment. *See Koch v. Koch Industries, Inc.*, 969 F. Supp. 1460 (D.Kan.1997).

April 6, 1998. The complexity of this case -- a case largely turning upon events occurring between the years of 1980 and 1985-- is not easily captured in words. As the remaining claims concern Koch Industries' "Pine Bend" refinery and the manner in which certain items were disclosed in the financial records of Koch Industries, the evidence in this case has, not surprisingly, primarily concerned Koch Industries' refinery business and the accounting treatment of the challenged items. In addition, all parties have repeatedly explored the family history of the Koch family and, in particular, the strained relations between William Koch and Charles Koch. The personal motives, biases and prejudices of each witness are routinely explored in substantial depth.

On Friday, May 1, 1998, during the fourth week of the trial, the plaintiffs filed a motion for mistrial (Dk.808). In that motion the plaintiffs argue that the defendants have violated two separate aspects of this court's *in limine* rulings and that the prejudice caused by those violations cannot be remedied by any lesser remedial measure. First, the plaintiffs contend that the defendants have violated the court's order regarding evidence of post-1985 lawsuits between any of the plaintiffs and any of the defendants. Specifically the plaintiffs contend that the defendants have unfairly interjected inflammatory and prejudicial evidence that William and Fred Koch sued their mother, Mary Koch, in 1988/1989. The plaintiffs also contend that counsel for the defendants intentionally violated the court's *in limine* rulings by positing the following question to William Koch during cross-examination: "Well, I think as long as you're getting into the allegations and the merits the Court found against you on every issue . . . in those case (sic), didn't they."[3] Secondly, the plaintiffs contend that the defendants violated the court's *in limine* rulings by "eliciting David Koch's testimony concerning his visit to a psychiatrist he incorrectly believed was

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[3] The plaintiffs' objection to this question was immediately sustained.

counseling William Koch." Plaintiffs Motion for Mistrial (Dk. 808 at page 7).

On May 1, 1998, the court heard oral argument to consider the plaintiffs' motion for mistrial. The defendants opposed the plaintiffs' motion. The defendants contended that no violation of the court's *in limine* rulings has occurred, or in the alternative, that if any *in limine* ruling has been violated, nothing identified by the plaintiffs warrants granting their request for a mistrial. At the conclusion of the hearing, the court denied the plaintiffs' motion. The court further indicated that it would reduce its ruling to writing at a subsequent date. This memorandum and order summarizes and elaborates on the court's reasons for denying the plaintiffs' motion for mistrial.

Standards for Evaluating Motion for Mistrial

The admission of evidence, as well as the decision to grant or deny a motion for mistrial, is committed to the discretion of the trial court. *See Towerridge, Inc. v. T.A.O., Inc.*, 111 F.3d 758, 769 (10th Cir. 1997). "The matter of declaring a mistrial or granting a new trial on such grounds is peculiarly within the discretion of the trial judge for he is in a better position than this court to assess the potentially prejudicial impact of such conduct by parties, witnesses and counsel." *Malandris v. Merrill Lynch, Pierce, Fenner & Smith*, 703 F.2d 1152, 1179 (10th Cir. 1981) (citing *Standard Industries, Inc. v. Mobil Oil Corp*, 475 F.2d 220, 228 (10th Cir.), *cert. denied*, 414 U.S. 829, 94 S.Ct. 55, 38 L.Ed.2d 63 [1973])), *cert. denied*, 464 U.S. 824 (1993). "[A] mistrial is a drastic remedy and should not be granted 'unless there has been an error so prejudicial that justice could not be served by continuing in the trial and there is no other method by which the prejudice can be removed.'" *Waitek v. Dalkon Shield Claimants Trust*, 934 F.Supp. 1068, 1098 (N.D. Iowa 1996) (quoting *Underwood v. Colonial Penn Ins. Co.*, 888 F.2d 588, 590 (8th Cir. 1989) (citation omitted)), *aff'd*, 114 F.3d 117 (8th Cir. 1997). In determining whether a mistrial is warranted,

the court should consider all relevant facts and circumstances surrounding the movant's motion. That evaluation should include a careful analysis of the degree and nature of the alleged prejudice in the context of the entire trial – as discounted by the likely efficacy of less drastic remedial measures, such as limiting instructions or the striking of testimony. Whether the non-moving party's conduct that ostensibly precipitated the motion for mistrial was a knowing or willful violation of the applicable evidentiary or procedural rules, or a prior order of the court, or was done for an improper motive, are also considerations potentially relevant to this analysis.

Analysis

Post-1985 Lawsuits:

Emotional reaction of Mary Koch to Foundation litigation

Contrary to the plaintiffs' argument, defense counsel's questions related to William Koch's suit against his mother and her reaction to that suit did not violate the court's *in limine* ruling. In fact, as the transcript reflects, the court overruled the plaintiffs' objection to the latter question. As the proposed limiting instruction regarding post-1985 lawsuits reflects,[4] the court does not consider the propriety of William

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[4] After considering the submissions and arguments of the parties, the court has drafted the following limiting instruction:

> You have heard testimony that William and Frederick Koch have filed other lawsuits against their brothers, Charles and David Koch. [You also have heard evidence that Charles and David Koch have filed lawsuits against William and Frederick Koch.] This testimony has been offered as some evidence of the state of the family relationships between the four Koch brothers. You may consider this evidence on issues of the motives, intent, bias, and credibility of the parties. You may not consider the testimony as evidence that any of the parties files too many lawsuits or files lawsuits which lack merit. It is not an issue for you to decide or even to consider whether the brothers' feelings for each other and other family members are proper or not. This case is not to be decided on the

Koch's feelings toward his mother to be an issue in this case, but the court does believe it may be relevant in judging the intensity of William Koch's feelings towards his brothers for the jury to hear that William Koch risked and disregarded his mother's feelings in suing his brothers. Any doubts that the court may have had about its *in limine* ruling are gone after seeing the plaintiffs' case to date and the issues that have been emphasized. The plaintiffs, in particular through the testimony of William Koch, have gone to great lengths to highlight Charles' and David's feelings toward William. Despite all the pretrial wrangling over this issue, the court does not believe that anyone is really surprised by how the evidence on this issue has come in.

Defense Counsel's Question Disclosing the Results of the William and Fred Koch's Litigation Contesting Their Mother's Will

The court agrees that defense counsel's question disclosing the outcome of William and Fred Koch's litigation contesting Mary Koch's will violated the order *in limine*. The court also considers William Koch's testimony preceding that question to have exceeded the scope of the order *in limine*. Instead of just answering the question and then letting the plaintiffs' counsel elicit William Koch's reasons for the suit, William Koch jumped ahead and gave his reasons but described them so as to appear as a factual attack on the integrity of the defense counsel.

Neither of these circumstances warrant the serious relief of a mistrial in this case. The court believes both sides have violated the order *in limine* in this case. The court notes that

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basis of passion or prejudice for or against any party but on the weight and credibility of the evidence on the essential elements of the underlying claims.

This instruction will be provided to the jury either during the presentation of evidence or in the court's final instructions.

the plaintiffs requested and the defendants agreed to an order *in limine* that foreclosed both sides from presenting evidence or referring to "comments, findings or rulings made by this court or any other court concerning the plaintiffs, the defendants or any of the claims in this case or any other litigation involving these partes." Despite this agreed order, the plaintiffs have repeatedly referred to the magistrate judge's and the district court's discovery orders in the *Koch I* litigation without ever first approaching the bench and asking for the court to reconsider its ruling.[5] In fact, both exhibits were both offered by the plaintiffs and even admitted into evidence without objection from the defendants. In addition, the plaintiffs have even highlighted portions of the magistrate judge's order as it concerns the Fortune article. This having been said, this is the court's point: The court wants both sides to abide by the order *in limine in toto*, and that if the parties subsequently agree to matters that contravene the order then they should inform the court first. If any party intends to broach an area addressed in the order *in limine* then that party should inform the other side and court first. Although both sides have transgressed certain aspects of the *in limine* rulings, the parties have in general done a fine job of abiding by the letter and spirit of the numerous rulings set forth in the court's *in limine* rulings. The court anticipates that counsel will continue with those efforts, particularly in light of these additional admonitions.

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[5] In light of these transgressions, the court read the following limiting instruction, approved by all parties, to the jury:

> You should not consider any written order of this court, or any written order of the magistrate judge, to be any comment on any of the evidence relevant to the issues before you. You are the sole judges of the facts.

David Koch's Testimony Regarding the Psychiatrist

In its April 3, 1998, memorandum and order, the court made the following ruling on the plaintiffs' motion to reconsider the court's March 20, 1998, memorandum and order:

> The court modifies its earlier ruling as to David Koch's testimony concerning his visit with a psychiatrist during which the psychiatrist made certain comments about William Koch. The court takes this motion under advisement, and neither side shall refer to this evidence in any statement, argument, or testimony before the jury without first approaching the bench and having its admissibility determined by the court. The court denies the plaintiffs' motion to reconsider as it concerns Charles Koch's testimony about what William Koch had told him.

April 3, 1998, Memorandum and Order at 12 (footnote omitted).

Contrary to the plaintiffs' arguments, the defendants did not "deliberately violate" the court's April 3, 1998, order during their examination of David Koch. So that it is clear, the court's April 3, 1998, order did not preclude the defendants from eliciting testimony from David Koch regarding the fact that he once visited a psychiatrist whom he believed to be treating William Koch. Instead, the order was only intended to preclude the parties from eliciting testimony regarding statements attributed to the psychiatrist. Assuming, *arguendo*, that the psychiatrist's statements to David Koch are not privileged and subject to exclusion on that basis alone, the proponent of such testimony must clear the additional hurdle of demonstrating the admissibility of the psychiatrist's statements as non-hearsay or as falling within a recognized hearsay exception. Prior to attempting to elicit any statements attributed to the psychiatrist, the party seeking to elicit that testimony shall first approach the bench.

As David Koch did not testify about any statements attributed to the psychiatrist,[6] the court's *in limine* ruling was not violated. The court believes that David Koch's limited testimony on this issue was relevant to rebut the plaintiffs' suggestion that David Koch harbors nothing but ill-will for his twin brother William. In any event, this brief testimony on this issue in no way precludes any of the plaintiffs from receiving a fair trial in this case.

Summary

In sum, the court does not believe that the plaintiffs have been unfairly prejudiced by any of the matters identified in their motion for mistrial. Any prejudice suffered as a result of defense counsel's question regarding the outcome of William and Fred Koch's challenge to their mother's will can be adequately addressed by appropriate limiting instructions. The court will instruct the jurors at the close of the case directing that they should consider only admitted evidence, that an attorney's question is not evidence, and that it is the witnesses' answers which are evidence. The court believes any possible unfair prejudice will be cured by these instructions and the court's limiting instruction on the post-1985 lawsuits. *See United States v. Cardall*, 885 F.2d 656 (10th Cir. 1989) (the assumption that juries can and will follow the instructions they are given is fundamental to our system).

The evidence highlighted by the plaintiffs' motion as "unfairly prejudicial" occupies only a small percentage of the mass of information presented during only the first four weeks of trial. Properly viewed in its context, the evidence and events identified by the plaintiffs as prejudicial are insufficient to warrant a mistrial. In short, there is no reason to believe that the prejudice suffered by any party is of sufficient

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[6] Counsel for the defendants specifically eschewed any attempt to elicit such testimony from David Koch. Trial Transcript at 1280.

magnitude as to have seriously prejudiced their respective right to a fair trial.

IT IS THEREFORE ORDERED that the "Plaintiffs' Motion for Mistrial" (Dk.808) is denied.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILLIAM I. KOCH; et al.,
Plaintiffs-Appellants,

And

UNITED STATES TRUST COMPANY OF NEW YORK, as trustee; et al.,
Plaintiffs,

v.

KOCH INDUSTRIES, INC.; CHARLES G. KOCH; STERLING V. VARNER; DAVID H. KOCH; DONALD L. CORDES; THOMAS M. CAREY,
Defendants-Appellee.

No. 98-3223

ORDER
Filed April 4, 2000

Before **EBEL, McWILLIAMS,** and **MURPHY,** Circuit Judges.

The petitions for rehearing are denied.

The petitions for rehearing en banc are also denied.

The petitions for rehearing en banc were transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, those petitions are also denied.

Entered for the Court
PATRICK FISHER, Clerk of the Court

by: /s/
Deputy Clerk

Supreme Court, U.S.
FILED
SEP - 8 2000
CLERK

No. 00-175/No. 00-0028

In The

Supreme Court of the United States

WILLIAM I. KOCH, *et al.*,
Petitioners,

v.

KOCH INDUSTRIES, INC., *et al.*,
Respondents.

On Petitions for Writ of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly found that the trial court's admission of evidence of other lawsuits brought by two of the plaintiffs was harmless error.

PARTIES TO THE PROCEEDINGS AND STATEMENT PURSUANT TO RULE 29.6

Plaintiffs-appellants below and Petitioners in No. 00-175 in this Court are: William I. Koch, Oxbow Energy, Inc., Spring Creek Art Foundation, Inc., Northern Trust Company, as trustee, Frederick R. Koch, and The Fiduciary Trust Company International ("The Oxbow Petitioners").

Plaintiffs-appellants below and Petitioners in No. 00-0028 in this Court are: L.B. Simmons Energy, Inc., d/b/a Rocket Oil Company, Gay A. Roane, Ann Alspaugh, Paul Anthony Andres Cox, Holly Antoinette Andres Cox Farabee, and Ronald W. Borders ("The Simmons Petitioners").

Also appearing as plaintiffs below were: United States Trust Company of New York, as trustee, Marjorie Simmons Gray, as trustee, Marjorie L. Simmons, as trustee, and Nationsbank, N.A., co-trustee of the Louis Howard Andres Cox Trusts B & D.

Defendants-appellees below and Respondents in this Court are: Koch Industries, Inc., Charles G. Koch, David H. Koch, Sterling V. Varner, Donald L. Cordes, and Thomas M. Carey.

Respondent Koch Industries, Inc. has no parent or subsidiary corporations that require disclosure under Supreme Court Rule 29.6.

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No. 00-175/No. 00-0028

In The

Supreme Court of the United States

WILLIAM I. KOCH, *et al.*,
Petitioners,

v.

KOCH INDUSTRIES, INC., *et al.*,
Respondents.

On Petitions for Writ of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Petitioners ask the Court to review the Tenth Circuit's finding that the district court committed harmless error, when, in the course of an eleven-week trial, the court admitted fleeting evidence concerning other lawsuits that two of the plaintiffs had filed. Respondents respectfully submit that review is inappropriate and unwarranted because, regardless of how one articulates the standard underlying the harmless error statute, the conclusion is inescapable that the evidence of other lawsuits "d[id] not affect the substantial rights of the parties." 28 U.S.C. § 2111 (1994). Moreover, application of the standard espoused by the Petitioners -- that there be a high

probability of harmlessness -- would not change the result in this case, because a unanimous appeals court found that it was "extremely doubtful" that admission of the disputed evidence affected the jury's verdict. Oxbow Petition Appendix ("Pet. App.") A42. The appeals court also concluded that the trial court's overall handling of this "vast and complex piece of litigation" "achieved fundamental fairness." Pet. App. A64.

To undo the enormous undertaking of judge and jury here because of the isolated admission of immaterial testimony that "d[id] not affect the essential fairness of the trial" would be the very antithesis of what Congress intended in enacting the harmless error statute. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553-54 (1984). Accordingly, the Petitions should be denied.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 203 F.3d 1202 (Pet. App. A). The pertinent reported opinions of the United States District Court for the District of Kansas are at 2 F. Supp. 2d 1385 and 6 F. Supp. 2d 1207 (Pet. Apps. B and C) and at 37 F. Supp. 2d 1231. The pertinent unreported opinion of the District Court is at 1998 WL 975598 (Pet. App. D).

STATEMENT

The plaintiffs in this case were individual and organizational shareholders of Koch Industries, Inc. ("KII" or "the Company"), who sued the privately-held Company and some of its individual officers, alleging fraud in connection with the 1983 buyout of their interest in KII. Plaintiffs asserted claims

under sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and claims under state law for breach of fiduciary duty, breach of warranty and fraud. Plaintiffs' primary contention was that defendants misrepresented or failed to disclose material facts that would have affected the sale price of plaintiffs' KII stock. Pet. App. A2, A5.

The litigation below spanned a period of fifteen years and culminated in a trial lasting nearly three months. Pet. App. A64. Discovery included the production of several hundred thousand pages of documents and more than 150 depositions. By the start of trial, the district court had generated more than 600 pages of written opinions, including a 337-page opinion that granted defendants summary judgment on nine of plaintiffs' twelve claims. *See generally Koch v. Koch Industries, Inc.*, 969 F. Supp. 1460 (D. Kan. 1997).

Prior to trial, plaintiffs filed eight motions in limine to exclude evidence. Pet. App. B2. One of these objected to introduction of evidence concerning other lawsuits filed by two of the plaintiffs, William and Frederick Koch, against their mother and/or brothers, defendants Charles and David Koch. The trial court found that the evidence was relevant and admissible to demonstrate, among other things, the state of Koch family relations around the time of the sale of stock and to show bias against the defendants. Pet. App. B10-14. A subsequent pretrial order precluded all parties from going into the merits of, or the evidence involved in, the other lawsuits. Pet. App. C10.

During trial, passing mention was made of the other suits in defendants' opening statement and during cross examination of William Koch. Trial Transcript ("Tr.") Vol. T1, pp. 354-55; Vol. T4, pp. 2721-24. No other evidence was

presented on the subject, and defendants made no reference to other lawsuits during closing arguments.[1]

William Koch was one of 40 fact and expert witnesses whose testimony was presented to the jury. His testimony on the other lawsuits comprised fewer than four pages of trial transcript; his entire testimony encompassed 968 pages. The entire trial transcript totaled 7,462 pages.

The jury also heard evidence establishing that plaintiffs had been advised in connection with their sale of KII stock by two Wall Street law firms and by the New York investment banking firm of Goldman Sachs & Company. Pet. App. A4.

At the close of trial, the court instructed the jurors on the elements of plaintiffs' claims, and required the jury to answer special interrogatories on each element of the claims. Tr. Vol. P4, pp. 3096-114. The court also gave a limiting instruction concerning the testimony pertaining to William's and Frederick's other lawsuits, directing the jury that such evidence could be considered only "on issues of the motives, intent, bias, and credibility of the parties," but could not be

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[1] In admitting the other-lawsuits evidence, the district court did not find that the lawsuits themselves were central to Respondents' defense, as Petitioners state. *See* Oxbow Pet. 4-5. Rather, the court stated that William Koch's "longstanding mistrust" and "animosity" toward defendants Charles and David Koch were "central to the defendants' case in several regards." Pet. App. B12. As discussed *infra*, Respondents' primary defense was that no material misrepresentations were made to plaintiffs and that plaintiffs received a fair price for their KII stock.

considered as evidence of whether the Koch plaintiffs were too litigious, whether their suits lack merit, or the propriety of the family's relationships with one another. Pet. App. A39. The court concluded the instruction with the following admonition:

> This case is not to be decided on the basis of passion or prejudice for or against any party but on the weight and credibility of the evidence on the essential elements of the claims and theories.

Tr. Vol. P4, p. 3195.

The jury returned a verdict in favor of defendants on all claims. Pet. App. A7. Pursuant to the special interrogatories, the jury specifically found that defendants made no material misrepresentations or omissions, and that plaintiffs were paid "a fair price" for their KII stock. Tr. Vol. P4, pp. 3097-98.[2]

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[2] In this regard, Petitioners present an incomplete record when they state that "the jury found that the defendants did in fact make misrepresentations and/or omissions" but "awarded no damages." Oxbow Pet. 5. The jury, in fact, found that any such misrepresentation or omission was not material. Tr. Vol. P4, pp. 3096-97. The plaintiffs failed even to meet their burden of showing that a misstatement or omission was made that "*might* materially affect the valuation of the stock." *Id.* (emphasis added). The jury additionally found that plaintiffs had failed to prove that they sold their shares for less than fair market value, and further, that defendants had proved by clear and convincing evidence that KII "paid a fair price for the plaintiffs' stock." *Id.* at pp. 3098; 3173-74.

Following trial, the district court issued a Memorandum and Order setting forth rulings on outstanding motions. The court concluded therein that "[h]ad the summary judgment record been the same as the trial record, none of the plaintiffs' claims would have survived summary judgment." *Koch v. Koch Industries, Inc.*, 37 F. Supp. 2d 1231, 1235 (D. Kan. 1998).

Plaintiffs appealed "a litany" of the district court's rulings to the Tenth Circuit, including its admission of evidence about the Koch plaintiffs' other lawsuits. Pet. App. A7. A unanimous panel affirmed the trial court on all 17 rulings challenged by plaintiffs, save two.[3] In particular, it affirmed the single summary judgment ruling challenged by plaintiffs on appeal. Pet. App. A8-17.

As to the evidentiary issue, the appeals court found that the trial court erred in admitting testimony about the other lawsuits because the evidence was irrelevant. Pet. App. A41-42.[4] In any event, the court held this error was harmless:

> Having reviewed the transcript of this trial, this court cannot reasonably conclude that the jury would have found for the Plaintiffs had it not learned of these other lawsuits. In the

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[3] The court held that the trial court had incorrectly instructed the jury on aspects of two claims under Texas law brought by three of the Simmons Petitioners. Pet. App. A48-52.

[4] For the cogent reasons stated by the district court, (*see* Pet. App. B10-14), Respondents respectfully disagree with the appeals court's conclusion that the evidence was wrongly admitted.

> context of this eleven week trial, it is extremely doubtful that the lone, brief colloquy between defense counsel and William about suing his brothers and mother and one passing mention of this evidence in the Defendants' opening statement caused the jury to find for the Defendants. Therefore, although the district court did err in admitting the disputed evidence, that error did not sufficiently prejudice the Plaintiffs to warrant reversal of the judgment.

Pet. App. A42.

In closing, the appeals court observed that in the context of litigation lasting a decade-and-a-half and a trial of nearly three months' duration, it could not reasonably expect perfection from the trial court, but that it was "satisfied that the district court achieved fundamental fairness in its presentation of this vast and complex piece of litigation to lay fact finders." Pet. App. A64.

REASONS FOR DENYING THE WRIT

1. Review Is Unwarranted Because Admission of the Evidence Was Harmless Error Under Any Formula.

Review by the Court is unwarranted because admission of the other-lawsuits evidence did not affect Petitioners' substantial rights. The testimony pertaining to other lawsuits related to only two of more than a dozen plaintiffs and accounted for no more than ten minutes of a complicated, eleven-week trial. The disputed evidence did not bear on any of the required elements of plaintiffs' claims. It was deemed by the appellate court to have been erroneously admitted because it was irrelevant, not because it was prejudicial. The evidence presented by plaintiffs in affirmative support of their claims, moreover, was so deficient as to cause the trial court to conclude that had it been aware of the record prior to trial, it would have granted summary judgment to defendants on all claims.

Most significantly, any improper influence that the other-lawsuits evidence might have had on the jury's deliberations was avoided by the trial court's instruction directing the jurors *not* to consider the testimony as evidence that plaintiffs tended to file lawsuits that lacked merit, and admonishing them to decide the case on the basis of evidence going to the essential elements of plaintiffs' claims, not on the basis of passion or prejudice. It is an "almost invariable assumption of the law that jurors follow their instructions," *Richardson v. Marsh*, 481 U.S. 200, 206 (1987), and the record contains persuasive evidence that they did so in this case. The jury made express findings against plaintiffs with respect to two elements essential to all four of their claims, namely, that

there were no material misstatements or omissions and that KII paid a fair price to plaintiffs for their stock. These findings necessarily defeated liability, regardless of the evidence on any other issue in the case. They also demonstrate that the jury was careful to focus on the requirements of each claim, as instructed, without regard to any conduct attributed to plaintiffs with respect to other litigation.

Viewing the other-lawsuits evidence in the context of the entire case, as a reviewing court must, "one can[] say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." *Kotteakos v. United States,* 328 U.S. 750, 765 (1946).

Petitioners nonetheless would assign fault to the appellate court for failing to employ the guidance set out in *Kotteakos* for harmless error analysis in criminal cases. In particular, the Simmons Petitioners assert that *Kotteakos* required the court of appeals to inquire whether it was "highly probable" that the error was harmless, (Simmons Pet. 7), while the Oxbow Petitioners assert that the appeals court should have used a "significant-possibility-of-harm" test, (Oxbow Pet. 6). Regardless of how the circuit court articulated the standard, however, it is clear from its analysis that the unanimous panel was "sure" in "the conviction . . . that the error did not influence the jury, or had but very slight effect, [and that] the verdict and the judgment should stand." *Kotteakos,* 328 U.S. at 764-65.

Specifically, the appeals court found that it was "*extremely doubtful*" that the few, brief references to William Koch suing his brothers and mother affected the jury's verdict. Pet. App. A42 (emphasis added). This is but another way of

stating that it was "highly probable" that the evidence was harmless, or that there was no "significant possibility of harm" flowing from the trial court's error. That statement, which Petitioners ignore in their briefs, establishes that the Tenth Circuit in fact found with "fair assurance" that the error was not harmful.

The harmless error statute itself does not mandate a specific quantum of probability as to whether an error affected the substantial rights of a party, but only that there be a finding that such rights were affected. 28 U.S.C. § 2111 (1994). Here, the appeals court described its obligation in terms that comport with the statute and with *Kotteakos*: "When a trial court erroneously receives evidence, this court will reverse the jury's verdict 'only if the error prejudicially affects a substantial right of a party.'" Pet. App. A42 (quoting *Sanjuan v. IBP, Inc.*, 160 F.3d 1291, 1296 (10th Cir. 1998)). Upon review of the transcript of the trial, the appellate panel concluded that the "error did not sufficiently prejudice the Plaintiffs to warrant reversal of the judgment." *Id.*

2. This Case Is Not an Appropriate Vehicle for Addressing the Harmless Error Standard in Civil Cases.

Petitioners contend that this case presents a "rare" and "opportune" vehicle for the Court to resolve a purported inter-circuit conflict concerning the appropriate standard to apply to harmless error in civil cases. Oxbow Pet. 1, 6. As discussed at Part 3 *infra*, the various expressions of appellate courts on this issue are not in need of reconciliation. In any event, this case does not "squarely and meaningfully" present the "split" among the circuits concerning the probability standard for harmless error in civil cases, (Oxbow Pet. 15),

because the court of appeals found that it was "extremely doubtful" that the error affected the jury's judgment. Pet. App. A42. Accordingly, had the appeals court applied what Petitioners describe as the "majority" rule and imposed a "highly probable" standard, the result would be unchanged.

Indeed, any so-called majority court would have concluded as the Tenth Circuit did that the other-lawsuits evidence was harmless because, with respect to the erroneous admission of evidence, "majority" and "minority" circuits alike look to the same factors that are determinative here: whether the evidence was relevant to a primary or central issue in the case;[5] whether the evidence was a small part of the total evidence adduced at trial;[6] whether there was ample other evidence on an issue or claim;[7] whether the erroneously admitted evidence was argued to the jury in closing argu-

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[5] *See, e.g., ATD Corp. v. Lydall, Inc.*, 159 F.3d 534, 549-50 (Fed. Cir. 1998); *Ahern v. Scholz*, 85 F.3d 774, 789 (1st Cir. 1996); *Schrand v. Federal Pac. Elec. Co.*, 851 F.2d 152, 157 (6th Cir. 1988); *Lataille v. Ponte*, 754 F.2d 33, 37-38 (1st Cir. 1985); *Jordan v. Medley*, 711 F.2d 211, 219 (D.C. Cir. 1983).

[6] *Ahern*, 85 F.3d at 791; *Resolution Trust Corp. v. Eason*, 17 F.3d 1126, 1132 (8th Cir. 1994); *Torres v. County of Oakland*, 758 F.2d 147, 151 (6th Cir. 1985); *Rabon v. Automatic Fasteners, Inc.*, 672 F.2d 1231, 1239 (5th Cir. 1982).

[7] *ATD Corp.*, 159 F.3d at 549-50; *Buchanna v. Diehl Mach., Inc.*, 98 F.3d 366, 372 (8th Cir. 1996); *Schrand*, 851 F.2d at 157; *Longoria v. Wilson*, 730 F.2d 300, 305 (5th Cir. 1984); *Pregeant v. Pan Am. World Airways, Inc.*, 762 F.2d 1245, 1249 (5th Cir. 1985); *Lionti v. Lloyd's Ins. Co.*, 709 F.2d 237, 243 (3d Cir. 1983).

ments;[8] whether any potential harm was cured by a limiting instruction or special verdict form;[9] and whether the jury's verdict could have been any different had the evidence not been admitted.[10] Therefore, application of the so-called majority rule would not yield any different result.

Nor does this case present any of the questions concerning the burden of persuasion in harmless error cases that Petitioners seek to press here. *See* Simmons Pet. 5; Oxbow Pet. 9 n. 4. The court of appeals did not even discuss which party had the burden of persuasion, because it had no need to do so. *See Barth v. Gelb*, 2 F.3d 1180, 1189 (D.C. Cir. 1993). The evidence concerning harm was not in equipoise, and the reviewing court was not in "grave doubt" as to the harmlessness of the evidence. *Cf. O'Neal v. McAninch*, 513 U.S. 432, 436 (1995). Because the record

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[8] *Rabon*, 672 F.2d at 1239.

[9] *ATD Corp.*, 159 F.3d at 549-50; *Anderson v. Phillips Petroleum Co.*, 861 F.2d 631, 637 (10th Cir. 1989); *Aetna Cas. & Sur. Co. v. Gosdin*, 803 F.2d 1153, 1160 (11th Cir. 1986); *Lionti*, 709 F.2d at 243. *Cf. Williams v. United States Elevator Corp.*, 920 F.2d 1019, 1024 (D.C. Cir. 1990) (erroneous jury instruction found harmless where the trial court's use of special verdict forms made it "easy to ascertain that the erroneous . . . instruction could not have influenced" the verdict).

[10] *ATD Corp.*, 159 F.3d at 550; *Ahern*, 85 F.3d at 789; *Paul v. Farmland Indus., Inc.*, 37 F.3d 1274, 1277 (8th Cir. 1994). *Cf. Williams*, 920 F.2d at 1024-25.

regarding harmlessness did not present a close question, burdens of persuasion are of no moment here.[11]

Likewise, the fact that this litigation involves "tremendous financial stakes" and that both sides are "well-represented by experienced counsel," (Oxbow Pet. 14), does not distinguish it from numerous others.[12] Further, the figures provided by Petitioners regarding the frequency of civil cases raising harmless error disputes suggest that opportunities to address this issue are commonplace, not rare. Petitioners identified 671 civil cases undertaking harmless error analysis since 1999. Oxbow Pet. 13. Our research found that the four circuits characterized by the Oxbow Petitioners as "minority" circuits have decided at least 200 harmless error disputes in civil cases since 1983, when the Ninth Circuit first articulated the "more-probable-than-not" formula in *Haddad v. Lockheed California Corp.*, 720 F.2d 1454, 1459 (9th Cir. 1983). Thus, if there were a need to refine the harmless error standard in

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[11] For this and other reasons, this case is not a suitable medium through which to address Petitioners' concerns that the purported split in the circuits regarding harmless error in civil cases has persisted "even after this Court's decision in *O'Neal*." Oxbow Pet. 10. In *O'Neal*, a habeas case, the Court took pains to limit its holding to the "special circumstance" when a court "(1) reviews a state-court judgment from a criminal trial, (2) finds a constitutional error, and (3) is in grave doubt about whether or not that error is harmless." 513 U.S. at 435. None of these factors is present here.

[12] We note in this regard that while Petitioners' state that "[a]s much as $2 billion is at stake" in the litigation, (Oxbow Pet. 3), in fact, 75% of plaintiffs' claims were dismissed on summary judgment, and the prayer for relief submitted to the jury was reduced accordingly.

civil cases, there have been and will be other, better, opportunities to do so.

3. A Variety of Formulations Are Permissible for Determining Harmless Error in Civil Cases.

Petitioners' claim of an intractable split among circuits on the issue of harmless error in civil cases is not borne out upon examination of the cases. In practical application of harmless error analysis to evidentiary errors in particular, so-called minority and majority circuits often resemble each other. Petitioners also fail to demonstrate why the existence of a variety of articulations of the harmless error standard is intolerable in civil cases where constitutional error is not at issue.

In reality, the circuit courts do not fall crisply into two camps, as Petitioners suggest, but have variously stated the required standard of proof. *Renz v. Grey Adver. Inc.*, 135 F.3d 217, 223-24 (2d Cir. 1997). While a majority of circuits hold that *Kotteakos* should govern harmless error analysis in civil cases, these courts do not all formulate the *Kotteakos* standard in terms of high probability of harmlessness.[13]

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[13] *Compare McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 928 (3d Cir. 1985) (errors are not harmless unless it is "highly probable" that they did *not* affect a party's rights); *with Taylor v. Virginia Union Univ.*, 193 F.3d 219, 235 (4th Cir. 1999) (in assessing whether evidentiary error was harmless, the reviewing court "need only be able to say 'with fair assurance . . . that the judgment was not substantially swayed by the error[s]'") (citations omitted); *cert. denied,* 120 S. Ct. 1243 (2000); *and Schrand v. Federal Pac. Elec. Co.*, 851 F.2d 152, 157 (6th Cir. 1988) (harmless error inquiry "involves an assessment of the

(continued...)

In actual operation of the harmless error rule, moreover, the purported conflict among the circuits is "more semantic than real." *Cf. Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097, 2110 (2000). For example, as discussed above, both "majority" and "minority" courts assess the impact of evidentiary errors based on the same factors. The commonality of these factors yields reliably uniform results irrespective of the precise formulation of the standard for harmless error in civil cases. Thus, the need for a rigid standard is far from compelling.

Furthermore, while Petitioners stress that the harmless error statute makes no distinction between civil and criminal cases, the Court has observed that "this does not mean that the same criteria shall always be applied regardless of this difference." *Kotteakos*, 328 U.S. at 762. Congress enacted a single statute applicable to both criminal and civil matters, but "[i]t did not require the same judgment in [a criminal case] as in one involving only some question of civil liability." *Id.* at 763.

Kotteakos in fact eschewed fixed formulas in favor of an analysis of the totality of the circumstances:

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[13] (...continued)
likelihood that the error affected the outcome of the case . . . . '[I]f one cannot say, with fair assurance, . . . that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.'") (quoting *Kotteakos v. United States*, 328 U.S. at 750, 765 (1946)) (emphasis added); *United States v. Killough*, 848 F.2d 1523, 1527 (11th Cir. 1988) ("[o]nly if an error prejudiced a substantial right of a defendant may a court of appeals reverse"; "[w]hether an error is harmless or prejudicial depends on the facts of each case").

> In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of stare decisis by what has been done in similar situations. Necessarily the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted to casting the balance for decision on the case as a whole, are material factors in judgment.

328 U.S. at 762 (citations omitted). *Kotteakos* indeed recognized that application of the harmless error statute required "discrimination [and] judgment transcending confinement by formula or precise rule." *Id.* at 761. The Tenth Circuit here exercised judgment and undertook the kind of fact-specific analysis of the entire case that the Court endorsed in *Kotteakos*, and there is no need to review, or to reverse, its conclusion here.

CONCLUSION

For the foregoing reasons, the Petitions for writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

WILLIAM I. KOCH; OXBOW ENERGY, INC.; SPRING CREEK ART FOUNDATION, INC.; NORTHERN TRUST COMPANY; FREDERICK R. KOCH; and THE FIDUCIARY TRUST COMPANY INTERNATIONAL,

Petitioners,

v.

KOCH INDUSTRIES, INC.; CHARLES G. KOCH; STERLING V. VARNER; DAVID H. KOCH; DONALD L. CORDES; and THOMAS M. CAREY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR PETITIONERS

Respondents cannot and do not deny the pervasive and entrenched split presented by this Petition. Rather, they snipe meaninglessly at the edges of the split and beg the question presented by arguing that the Tenth Circuit's error in using the wrong harmless-error standard was itself harmless error. What Respondents fail to do, however, is provide a cogent reason for allowing this split to fester any longer. The split will not go away by itself, it is cleanly presented by the Petition, the parties are highly motivated, and there are no vehicle problems. The choice between standards for harmless error is also meaningful to the resolution of this case because, despite Respondents' distorted discussion of the facts and opinion below, the evidentiary errors easily exceed the majority harmless-error standard.

I. THE 8-4 SPLIT OVER THE CIVIL HARMLESS-ERROR TEST IS REAL, MEANINGFUL, AND INTRACTABLE.

Twelve of thirteen circuits are participants in the split over which harmless-error standard to use in civil cases. The split is widely recognized and the meaningful difference between the two standards has been extensively discussed. Pet. 7-10. The split is entrenched and Respondents do not suggest it will ever be resolved absent intervention by this Court.

Rather than deny the obvious, Respondents argue that "the circuit courts do not fall crisply into two camps" and that this Court should tolerate the existing "variety" among the circuits on this fundamental procedural standard. BIO 14. The first argument is both wrong and irrelevant, the second argument asks this Court to abandon its fundamental role in assuring that federal law is equally and fairly administered throughout the federal judicial system.

Regarding the nature and significance of the split, Respondents ignore the statements of the circuits themselves, many of whom have expressly and "crisply" rejected what they view as the materially different approach of their opposing sister circuits. The Ninth Circuit, which in 1983 led the way in creating this split, *see Haddad v. Lockheed Cal. Corp.*, 720 F.2d 1454, 1458 (CA9 1983), continues to recognize the meaningful difference between its "'less stringent'" minority approach and the majority *Kotteakos* standard. *Kennedy* v. *Southern California Edison Co.*, 219 F.3d 988, 998 (CA9 2000) (citation omitted). And the Third Circuit, in rejecting the Ninth Circuit's approach, unambiguously described that approach as "imposing a laxer harmless error standard in civil cases" and described the alternate *Kotteakos* approach as making it "more difficult to prove harmless error." *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 925 (CA3 1985).

Respondents' attempt to blur the well-recognized distinction between the two camps, BIO 14 n. 13, simply pulls lan-

guage out of context and is, in any event, irrelevant. Each of the majority-side formulations quoted by Respondents comes down to the same point: that even a substantial possibility of influence from the error constitutes harm. Each of the minority-side courts, by contrast find harm only where an error more probably than not *caused a different result.* Pet. 7-8; *see* Pet. App. A42 (whether "jury would have found for" plaintiffs but for the error).

Rather than being mere "semantic[s]," BIO 15, the different approaches affect outcomes. Thus, the Third Circuit emphasized the significance of the divide by noting that the more stringent standard it went on to adopt "would result in more reversals." *McQueeney,* 779 F.2d at 926. And in a related criminal context, Judge Kozinski observed that the choice between the *Kotteakos* standard and the more-probable-than-not standard "isn't just wordplay." *United States* v. *Hitt*, 981 F.2d 422, 425 n. 2 (CA9 1992).[1]

> A 55% likelihood that the error was harmless qualifies as "more probable than not," but it's hardly a "fair assurance" of harmlessness. *Kotteakos* defines "fair assurance" as absence of a "grave doubt," 328 U.S. at 765, 66 S. Ct. at 1248, and a 45% chance that the defendant would have been acquitted but for the error certainly seems like a "grave doubt." While we obviously don't deal in such precise probabilities, "more probable than not" and "fair assurance" can, in some cases, lead to conflicting results.

Id.

The claim that both sides of the split "look to the same factors" under their respective tests, BIO 11, misses the point.

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[1] Judge Kozinski was comparing standards in a since-resolved apparent intra-circuit split wherein some panels of the Ninth Circuit seem not to have felt obliged to follow *Kotteakos* even in criminal cases. 981 F.2d at 425. While having abandoned that view on the criminal side, the Ninth Circuit continues to deviate from the *Kotteakos* standard on the civil side.

It is not the various *inputs* to harmless-error analyses that are driving the split, but rather it is the *standard* or required degree of certainty against which those inputs are measured that is causing disagreement.[2] In the end, the minority more-probable-than-not standard represents a materially different approach that leads to different results across a broad range of cases where errors may have had an *influence* on the case, but cannot be found, *ex post*, to have more likely than not changed the result.

Regarding whether this Court should simply tolerate the divergent standards splitting the Circuits, suffice it to say that ensuring uniform administration of federal law is one of the Court's long-recognized and primary functions. The arbitrary suggestion that this widespread split simply be ignored disserves this Court and disserves the many litigants whose "substantial rights" now turn on geography rather than law.

II. THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR RESOLVING THE INTER-CIRCUIT CONFLICT.

Respondents are wrong in contending that this case in not an appropriate vehicle for addressing the split because the evidence was harmless under any standard. BIO 8. The evidence was highly prejudicial and likely would have required reversal under the standard mandated by this Court in *Kotteakos*. Respondents' arguments to the contrary are belied by their own prior admissions as to the importance of the disputed evidence and are based upon subtle mischaracterizations of the Tenth Circuit's conclusions.

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[2] This Court has recently had considerable briefing on precisely the difference between directions to consider certain evidence and the standard or "intelligible principle" against which that evidence must be measured. *See, e.g.*, Brief of *Amici Curiae* Association of American Physicians & Surgeons and Center for Individual Freedom in Support of Respondents, *Browner* v. *American Trucking Ass'ns*, No. 99-1257, at 19-20, 25-26 (Sept. 11, 2000).

A. The Tenth Circuit's Opinion Contains No Indication That The Error Would Be Deemed Harmless Under *Kotteakos*.

In its opinion, the Tenth Circuit reached the following conclusions:

- "[W]e cannot reasonably conclude that the jury *would have found* for the Plaintiffs had it not learned of [the evidence at issue]."
- "[I]t is extremely doubtful that the [evidence at issue] *caused* the jury to find for the Defendants."

Pet. App. A42 (emphasis added). These conclusions articulate a "but for" test, focusing on whether the absence of error would have changed the result. The court was simply applying the established Tenth Circuit standard, which it has acknowledged to be more difficult for appellants to satisfy and more forgiving of errors. *See United States Indus.* v. *Touche Ross & Co.*, 854 F.2d 1223, 1252-53 n. 39 (CA10 1988) (recognizing that Tenth Circuit applies a "lower standard in civil cases"), *impliedly overruled on other grounds as recognized in Suiter* v. *Mitchell Motor Coach Sales, Inc.*, 151 F.3d 1275, 1288 (CA10 1998).

The test set forth in *Kotteakos* is markedly different. In *Kotteakos* this Court stated that a judgment must be reversed unless the reviewing court can conclude with "fair assurance" that the error did not "*influence*" the jury and that the judgment was not "*substantially swayed* by the error." *Kotteakos* v. *United States*, 328 U.S. 750, 764-65 (1946) (emphasis added). All the Tenth Circuit said was that *it* could not conclude that the jury "would have" come out the other way. That is precisely the sort of analysis that this Court rejected in *Kotteakos*. As this Court explained in *Kotteakos*, "[t]he inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error." 328 U.S. at 764-65.

In an effort to suggest that the error would have been deemed harmless even under the stricter *Kotteakos* standard, Respondents repeatedly mischaracterize the Tenth Circuit's opinion. For example, Respondents constantly misdescribe the Tenth Circuit's opinion as concluding that it is "'extremely doubtful' that the error *affected* the jury's verdict." BIO at 9, 11. But as can be seen from the full quotations provided above, the Tenth Circuit did not find that it was "extremely doubtful" that the error "*influenced*" or "*affected*" the jury's verdict. It concluded at most that the error probably did not by itself *cause* the jury to find as it did.

The Tenth Circuit never determined whether the error might have "influenced" or "substantially swayed" the jury's verdict, as would be required by *Kotteakos*. To speculate at the petition stage on how that court would rule under the correct standard both usurps that court's prerogative and is not necessary in order for this Court to reach the legal issue presented. Rather, this Court can set the proper standard and leave application of that standard to the Tenth Circuit.

B. The Improperly-Admitted Evidence Was Sufficiently Significant As To Require Reversal Under *Kotteakos*.

Respondents are also wrong in their new-found disdain for the importance of the evidence they fought so hard to introduce. William Koch was both the lead plaintiff and the plaintiffs' most important fact witness at trial. Pet. App. B11. William Koch was the only plaintiff present at meetings in which defendants claimed to have disclosed the information at issue, and he in large measure represented the other plaintiffs in the negotiations with defendants. *Id.* He was thus the key witness for plaintiffs on almost *all* of the required elements of plaintiffs' claims, including whether defendants made misrepresentations and/or omissions, whether those misrepresentations were material, whether plaintiffs relied on defendants' misrepresentations, and whether they were damaged as a result.

Respondents now claim that "the disputed evidence did not bear on any of the required elements of plaintiffs' claims" and that it related to "only two of more than a dozen plaintiffs." BIO 8.[3] However, when Respondents sought to introduce this evidence they said precisely the opposite:

> William I. Koch is not only the lead plaintiff in this case. He is also the key non-expert witness supporting plaintiffs' claims.

Defendants' Br. in Opp. to Plaintiffs' Eight Motions *In Limine*, at 5.[4]

Respondents' real views regarding the importance of the improperly-admitted evidence are also made clear by their actions at trial. William Koch was such an important fact witness that Respondents cross-examined him for five straight days. It is also telling that the introduction of the evidence at issue was the *grand finale* of that five-day cross-examination. It was the one moment of high drama in a long trial that otherwise droned on and on about arcane issues related to generally accepted accounting principles and petroleum engineering. For Respondents now to claim that this emotionally-charged evidence must have been lost on the jury due to the length of the trial borders on the absurd. Respondents used the evidence in their opening statements, in their cross-

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[3] That latter claim is highly misleading. The two plaintiffs at issue – William and Frederick Koch – collectively owned (directly and indirectly) nearly three fourths of the stock held by the entire plaintiff group. Most of the other plaintiffs were corporations, trusts, or charitable foundations within their control

[4] In allowing Respondents to admit the evidence at issue, the district court agreed with Respondents and remarked: "The defendants point out that William Koch is not only the lead plaintiff, but he will likely be the fact witness most critical to the plaintiffs' success. In addition, William Koch assumed a leadership role with respect to the other selling shareholders and possessed more technical knowledge of the facts and issues by reason of his education, training and experience." Pet. App. B11.

examination of plaintiffs' most important witness, and again made veiled references to it in their closing argument.[5]

This strategic use of powerful evidence cannot be discounted as mere "passing mention." BIO 3. And if the references to the evidence made in Respondents' closing were not as direct as earlier, it was because they did not need to be – Respondents knew the judge would remind the jury for them. The district judge specifically instructed that "you may consider this evidence [about other lawsuits] on issues of the motives, intent, bias, and credibility of the parties." Tr. Vol. P4, at 3195; Pet. App. A39. The Tenth Circuit concluded that the admission of that evidence was error and that the instruction compounded rather than cured the error. Pet. App. A39, 42. If the jurors remembered *anything* in their deliberations, they surely remembered that William and Frederick Koch "sued their own mother." They likely also remembered that she ultimately disinherited them over *this very lawsuit.*

Respondents' reliance on the district court's admonitions that the case should not be decided on the basis of "passion or prejudice," BIO 5, is a complete red herring. As an initial matter, evidence that the plaintiffs in a case "sued their own mother" is precisely the sort of inflammatory and inherently prejudicial evidence that cannot be cured by such an instruction. But even assuming it could, the evidence nonetheless may have strongly influenced the jury's findings. Respon-

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[5] In their closing argument, Respondents asked the jury to consider William Koch's "hostility toward Charles," that William had used the "leverage of litigation" before, and that William Koch has "been at war with his brother, Charles, ever since [the buyout]." Tr. Vol. T10, pp. 7293, 7295, 7317. But nothing best brought this evidence to the front of the jurors' minds more than Respondents' final comments: "That's what this case is about. It's a modern parable. And the moral is, beware of a brother driven by the need for more money, by greed, and the desire to rule or ruin, because if you don't, you're in for 20 years of corporate warfare." Tr. Vol. T10, p. 7320.

dents expressly sought the admission of this evidence in order to "demonstrate bias" on the part of William Koch and thereby attack his credibility. Pet. App. A38-39. The district court erroneously allowed it to be admitted for that very purpose, and in fact expressly instructed the jury to consider it in evaluating the parties' "motives, intent, bias, and credibility." Tr. Vol. P4, p. 3195. The Tenth Circuit concluded that this was error. Pet. App. A42.

The district court expressly found that the improperly-admitted evidence bore upon the issues of reliance, plaintiffs' actual knowledge, and the adequacy of Respondents' representations. Pet. App. B12. Indeed, the district court further concluded that the improperly-admitted evidence was "*central to the defendants' case in several regards*," and that excluding "*these critical points*" would "*eviscerate the defendants' case.*" *Id.* (emphasis added).

Given the views of the parties and the district court below, it strains credulity for Respondents now to contend, BIO 9, that this Court and the Court of Appeals would have to be "sure" that the erroneous introduction of highly prejudicial evidence – including evidence that the principal plaintiffs "even sued their own mother" – did not "influence" or "substantially sway" the jury's verdict.[6] Because William Koch was the plaintiffs' most important fact witness at trial, the improper admission of the evidence at issue went straight to the heart of almost *every* core issue in the case.

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[6] Respondents claim the secondary split over the risk of uncertainty or doubt, Pet. 9 n. 4, is not implicated in this case. BIO 12. Regardless whether such uncertainty failed to appear under the forgiving standard applied below, such uncertainty would certainly exist under the *Kotteakos* standard. This case thus presents an opportunity first to articulate the correct harmless-error standard and then to allocate the risk under that standard if the question remains close.

C. It Is Inappropriate To Wait for A Better Vehicle That Will Never Come.

Respondents claim that the high stakes and thorough representation in this case do not distinguish it from other potential vehicles. BIO 13. Were that true, surely Respondents could have offered an example. But in fact, while Respondents agree with Petitioners and are correct in noting that this issue arises in hundreds of cases, *id.*, it seems rarely to appear in petitions to this Court. For example, in the most recent case to elaborate on the split, *Taylor v. Virginia Union Univ.*, 193 F.3d 219, 235 (CA4 1999), *cert. denied,* -- U.S. --, 120 S. Ct. 1243 (2000), the party in fact petitioned the Court, but did not present the harmless-error question. *See* Petition, *Taylor* v. *Virginia Union Univ.*, No. 99-1092 (Dec. 27, 1999). Respondents point to no case in which this Court actually had an opportunity to address the split. The harmless-error standard thus represents something of a paradox – all parties agree that the issue pervades the lower courts, yet the split is rarely presented for this Court's review. Unlike some questions on which the opportunities for review are indeed legion, Respondents simply cannot point to single credible alternate vehicle either pending or on the horizon that would allow this Court to resolve the split.

The current case is as good a vehicle for resolving this split as this Court is likely to see for a long time. Any question as to how the Court of Appeals would rule on remand under a new standard has not previously hindered this Court's review of even narrower harmless-error questions, *see O'Neal* v. *McAninch*, 513 U.S. 432 (1995), and can be left to the Tenth Circuit itself on remand

CONCLUSION

For the foregoing reasons and those set out in the Petition, the Petition for Writ of Certiorari should be granted.

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